Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL E. CASEY,

Petitioner,

v.

ROBERT E. RHOADES, AS TRUSTEE FOR THE FIRSTBANC SAVINGS ASSOCIATION EMPLOYEE STOCK OWNERSHIP PLAN, ALL OTHER PARTICIPANTS IN THE FIRSTBANC EMPLOYEE STOCK OWNERSHIP PLAN; THE OFFICE OF THRIFT SUPERVISION and THE TEXAS SAVINGS AND LOAN DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. May a member of an employee pension benefit plan who is not yet receiving benefits from the plan voluntarily execute a binding and valid waiver or assignment of his rights and his beneficiary's rights to future plan benefits?

II. Are §§ 8.04 and 8.05 of Tex. Rev. Civ. Stat. Ann. art. 852 preempted by ERISA to the extent that their application would frustrate Congressional intent in enacting ERISA?

III. Does res judicata apply to this case when the state administrative order in question does not address the same matters as are involved in this lawsuit and does not involve all of the same parties?

IV. Does 12 U.S.C. § 1818(i)(1) prevent a district court from exercising jurisdiction to determine whether the administrative order in question is effective to resolve a subsequent dispute?

V. Does a district court abuse its discretion in awarding attorney's fees and expenses for what in essence amounted to a trustee violating his contractual and statutory duties owed to Plan members, in filing a premature lawsuit, and for all time and expenses involved in the district court proceeding?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, p. 1a, and is reported at 196 F.3d 592. The Final Judgment of the United States District Court for the Southern District of Texas, Houston Division, is unreported, was entered on April 23, 1997, and is set forth in the Appendix at p. 24a. Casey filed a timely petition for rehearing. The petition was denied by the United States Court of Appeals for the Fifth Circuit on February 7, 2000, and is set forth in the Appendix, p. 41a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254(1). The United States Court of Appeals for the Fifth Circuit issued its denial of Casey's timely-filed petition for rehearing on February 7, 2000. Accordingly, this petition for a writ of certiorari was due to be filed on or before May 7, 2000. By order dated May 1, 2000, Justice Antonin Scalia extended the time for filing this petition for a writ of certiorari until June 7, 2000. Appendix at 43a. This Petition was timely filed on June 7, 2000, pursuant to the mailbox rule.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

29 U.S.C. § 1056(d)(1)

(d) Assignment or alienation of plan benefits.

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

29 U.S.C. § 1104(a)(1)

§ 1104. Fiduciary duties

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 USCS §§ 1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan; . . .

12 U.S.C. § 1818(i)(1)

(i) Jurisdiction and enforcement; penalty.

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 38 or 39 [12 USCS

> §§ 1831o or 1831p-1], and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section or under section 38 or 39 [12 USCS §§ 1831o or 1831p-1] no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

STATEMENT OF THE CASE

Rhoades, as trustee of the FirstBanc Employee Stock Ownership Plan (hereinafter "the ESOP" or "the Plan") and a holder of all the ESOP's assets, filed an interpleader action naming Casey, the Office of Thrift Supervision ("OTS"), the Texas Savings & Loan Department ("TSLD"), and 27 participants[1] in the ESOP. The OTS filed a separate enforcement action against Casey, which was subsequently consolidated with Rhoades' interpleader action.

Casey, OTS and TSLD all filed motions for summary judgment. Rhoades filed a motion for discharge and for award of attorney's fees. The district court granted OTS and TSLD's motions for summary judgment, denied Casey's motion for summary judgment, and entered an

[1] ERISA calls workers who have an interest in an ERISA employee benefit plan "participants." 29 U.S.C. § 1002. The employee benefit plan at issue in this appeal calls these same people "members." Therefore, in this petition, the terms "workers," "participants," and "members" may be considered to be interchangeable.

order awarding Rhoades approximately $24,000 in attorney's fees out of the monies that had been tendered into the registry of the district court. It is from these orders that Casey appeals.

As evidenced by the pleadings, motions, responses and briefs of the parties filed in the district court, the essential facts involved in this appeal appear to be undisputed. It is the application of law to these essentially undisputed facts upon which the parties to this appeal disagree.

Casey was the principal organizer, first president, and first chief executive officer of FirstBanc when it was created in 1985. As an employee of FirstBanc, Casey was entitled to participate, and did participate, in FirstBanc's employee retirement plan, which took the form of an ESOP.

By resolution of the FirstBanc board of directors and approval of the stockholders, the ESOP was established effective May 1, 1987. Casey was the original trustee of, and a member of the ESOP.

After the Plan was established, OTS and TSLD raised questions regarding its administration. On June 21, 1993, two voluntary, agreed administrative orders were entered into by Casey – one with the OTS and one with TSLD (hereinafter "the orders"). The portions of these orders that are at issue are virtually identical. The OTS order states:

> Casey shall forfeit, waive, and release any ESOP benefits, interests, distribution or claim for ESOP benefits, interests, and distributions ("ESOP Benefits"). . . .

The TSLD order states:

> Casey shall hereby forfeit, waive and release any and all ESOP benefits, interests, distributions or claims for ESOP benefits, interest, and distributions ("ESOP Benefits") . . .

Thereafter, FirstBanc dissolved the ESOP. The OTS and TSLD each wrote Rhoades, reminding him of the orders and insisting on the forfeiture and waiver. The ESOP trustee made distributions to, or on behalf of, other Plan participants, but withheld Casey's share of the Plan benefits. With the district court's permission, Rhoades interpleaded the $77,064.04 in dispute – representing Casey's ESOP account – into the registry of the district court.

Even though the OTS was a party to this interpleader action, it filed its own, separate Complaint for Enforcement of Order in the United States District Court for the Southern District of Texas. Casey was the only defendant and the only relief requested was as follows: "Pursuant to 12 U.S.C. § 1818(i)(1), OTS is entitled to enforcement of the outstanding Final Order, including obtaining an order directing DEFENDANT to waive his ESOP benefits." The enforcement case was consolidated into this interpleader action.

The OTS and the TSLD filed motions for summary judgment asking the Court to order that Casey has voluntarily waived his ESOP benefits and "to distribute Casey's waived benefits to remaining plan beneficiaries." Casey filed his own motion for summary judgment seeking recovery of the interpleaded funds. Rhoades filed a motion for dismissal and for attorney's fees.

The district court entered an order granting the OTS and TSLD's motions for summary judgment, denying Casey's motion for summary judgment, and awarding Rhoades $23,955.21 in attorney's fees. The district court also entered another order redistributing the benefits in Casey's Plan account to the other members of the Plan. Execution of that order was stayed by the district court.

In its opinion, the United States Court of Appeals for the Fifth Circuit affirmed the district court's summary judgment. The circuit court found that the district court was without jurisdiction to consider Casey's defenses to the enforcement action by the OTS. However, in the consolidated interpleader action, the district court and circuit court did consider Casey's proffered defense that the anti-alienation provision of ERISA does not bar Casey from voluntarily waiving retirement benefits belonging to him and his beneficiaries, and that an award of over $24,000 in attorney's fees was proper in an interpleader action in which the stakeholder actively litigated against Casey's position in the lawsuit.

Casey seeks a writ of certiorari from these rulings. He challenges the district court and circuit court's ruling in favor of the OTS and the TSLD. He also challenges the district court's award of attorney's fees to the plaintiff in interpleader, Robert E. Rhoades, as being an abuse of discretion under the facts and circumstances presented.

The district court incorrectly granted – and the circuit court incorrectly affirmed – the OTS and TSLD's summary judgment on the disposition of the retirement benefits in question. To the extent that the federal and state

statutes at issue are construed to deprive Casey, his statutorily designated beneficiary – his wife Linda – and his conditional beneficiaries of his retirement benefits, they contradict the anti-alienation provisions of the Plan and frustrate the clearly enunciated Congressional intent in enacting ERISA, to wit: the safeguarding of pension and retirement benefits so that they are enjoyed by the worker and his beneficiaries. Therefore, these statutes are preempted by ERISA.

The circuit court's opinion goes out of its way to portray Casey in an unflattering light. The circuit court notes that the OTS and TSLD made certain promises in return for Casey's agreement to waive retirement benefits. Appendix at 11a. The fact of the matter is that Casey's agreement to waive retirement benefits was only a small fraction of the total remedial action taken by Casey to ensure that the bank suffered no harm from the practices that were scrutinized by OTS and TSLD.

Separate and apart from Casey's waiver of his retirement benefits, Casey and two other gentlemen made a cash infusion into the ESOP in the amount of $363,979. In addition, Casey and the others relieved the bank of all liabilities outstanding in connection with certain stock purchases. The end result of these actions (without any consideration of Casey's retirement benefits whatsoever) was to leave the employee stock ownership plan in question with no liabilities whatsoever and with cash on hand.

As a result of the actions taken by Casey and the others, FirstBanc and the other remaining ESOP participants were certain not to suffer any financial harm at all, even without Casey's forfeiture of retirement benefits.

Casey not only complied with every other term of the cease and desist orders – he set about improving the bank's position under them even beyond that which OTS and TSLD had required in the cease and desist orders as originally drafted. The OTS and TSLD originally only requested that the ESOP be corrected. Casey suggested that the ESOP be rescinded rather than corrected, thereby improving the balance sheet of the bank by $179,691 more than under the OTS/TSLD plan of correction. The retirement benefits at issue in this appeal amount to less than eighty thousand dollars. OTS and TSLD agreed to Casey's proposed change. It is ironic, indeed, that OTS and TSLD were willing to accept the benefit of a "revision" or "modification" to the original cease and desist orders when same inured to the benefit of the bank, but is unwilling to accept a district court's consideration of a blatantly illegal provision of the cease and desist orders that form a small part of the overall orders.

ERISA's anti-alienation clause and the Plan's anti-alienation clause were designed to prevent precisely what occurred here – a voluntary assignment of retirement plan benefits to a third party not accomplished through a beneficiary designation or a qualified domestic relations order.

The district court erred in awarding attorney's fees to Rhoades who violated his paramount statutory obligation which requires that "a fiduciary shall discharge his duties

with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; . . . " 29 U.S.C. § 1104(a)(1).

Additionally, this is not a case where a total stranger to a controversy has deposited funds into court for the purpose of allowing two combatants to fight it out. This is a case where the plan trustee, who is charged with the responsibility of protecting and increasing the value of the Plan for the benefit of Casey and the other participants, deposited the funds in the registry of the court in order to evade his contractual and statutory obligations to the Plan beneficiaries.

Finally, Rhoades failed to introduce any evidence whatsoever establishing which portion of the almost $24,000 in attorney's fees that he sought and obtained, were related to the filing of the petition for interpleader. For all of these reasons, the district court's award of approximately $24,000 in attorney's fees was improper.

REASONS FOR GRANTING THE WRIT

When Congress enacted the Employee Retirement Income Security Act of 1974, or ERISA, as it is commonly known, it included in that legislation what has come to be known as "the anti-alienation clause." The anti-alienation clause, set forth in 29 U.S.C. § 1056(d)(1), prohibits the voluntary or involuntary assignment or alienation of plan benefits. This Court has held that the statutory language used by Congress bespeaks "a pension law protective

policy of especial intensity: Retirement funds shall remain inviolate until retirement."

Despite the strong public policy in favor of protecting retirement benefits, several courts of appeals around the country have held that participants in ERISA-protected retirement plans may knowingly and voluntarily waive their right to retirement benefits as part of a settlement of pending legal issues.

In 1997, this Court, in *Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754, 138 L. Ed. 2d 45, clarified the fact that the anti-alienation clause means what it says, and applies to attempted voluntary assignments of retirement benefits as well as attempts at involuntary seizures of those benefits.

As part of the settlement of administrative claims against him, Michael Casey purported to sign away the retirement benefits to which he, or the contingent beneficiary members of his family, would have been otherwise entitled. The district court and circuit court both failed to recognize that the anti-alienation clause expressly bars that which Michael Casey purported to do – waive his right to future retirement benefits. Worse yet, the courts both failed to recognize that it is not only Michael Casey who is damaged by such a ruling, but also his plan beneficiaries as well, none of whom purported to or actually did waive anything in the administrative settlement.

This case presents the Court with an opportunity to correct those courts who fail or refuse to acknowledge that the anti-alienation clause of ERISA applies across the board to voluntary and involuntary assignments of future

retirement benefits alike. This case presents the Court with an opportunity to correct those courts who hide behind the jurisdictional skirts of 12 U.S.C. § 1818(i)(1), thereby allowing to be done indirectly that which cannot be accomplished directly – the seizure of future retirement benefits from an ERISA-plan beneficiary and his contingent beneficiaries.

ARGUMENT

I. May a member of an employee pension benefit plan who is not yet receiving benefits from the plan voluntarily execute a binding and valid waiver or assignment of his rights and his beneficiary's rights to future plan benefits?

and

II. Are §§ 8.04 and 8.05 of Tex. Rev. Civ. Stat. Ann. art. 852 preempted by ERISA to the extent that their application would frustrate Congressional intent in enacting ERISA?

The circuit court held the anti-alienation provision of ERISA does not render the divestiture clause of the orders void and unenforceable. App.12a-15a. The circuit court specifically noted its belief that knowing and voluntary waiver of rights to retirement benefits in exchange for consideration was valid. App. 13a-14a. This holding is suspect for a reason that might not necessarily have been evident to the district court in April of 1997, but should have been well-evident to the circuit court in December of 1999 – this Honorable Court's opinion and judgment in *Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997).

Both this Court and the court of appeals below are well familiar with the facts and circumstances surrounding *Boggs*, as it traveled through the Fifth Circuit on its way to the United States Supreme Court.

Isaac Boggs worked for South Central Bell from 1949 until his retirement in 1985. *Boggs*, 117 S. Ct. at 1758. Isaac and Dorothy, his first wife, were married when he began working for the company. *Id.* They remained married until Dorothy's death in 1979. *Id.* Isaac and Dorothy had three sons. *Id.* Within a year of Dorothy's death, Isaac married Sandra, and they remained married until Isaac's death in 1989. *Id.*

In her will, Dorothy attempted to voluntarily transfer a portion of Isaac's retirement benefits to their three sons. *Id.* There is no doubt that barring pre-emption, under state law, Dorothy's voluntary transfer of the retirement benefits in question would have been valid and enforceable. *Id.* Under ERISA, however, all these retirement benefits would have been payable to Sandra, as Isaac's surviving spouse, and designated beneficiary. *Id.* at 1759.

Sandra Boggs filed suit in federal district court, seeking a declaration that ERISA pre-empts the application of Louisiana's community property and succession laws to the extent that they give force and effect to Dorothy's attempted voluntary transfer of the retirement benefits. *Id.* The district court granted summary judgment against Sandra, holding that ERISA pre-emption did not apply. *Id.*

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the summary judgment against Sandra. *Id.* The Fifth Circuit concluded that

the voluntary transfer of the interest in the pension benefits from Dorothy to her sons was not pre-empted by, or prohibited under, ERISA. *Id.* At Sandra's request, this Honorable Court granted a writ of certiorari. *Id.*

Before reaching the merits of the dispute, this Court noted "the comprehensive nature" of the ERISA statute as well as "the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Id.* at 1760. This Court further stressed its understanding of the importance of community property laws and the central role that they play in the lives of married persons in community property states (the Court noted that community property laws have existed for hundreds of years "because of their manifold excellences and are not lightly to be abrogated or tossed aside."). *Id.*

In considering the scope of ERISA pre-emption, the Court noted that by statute, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." *Id.*, citing 29 U.S.C. § 1144(a). The Court stated that its analysis begins and ends with the simple question of whether "state law conflicts with the provisions of ERISA or operates to frustrate its objects." *Id.* at 1760-61.

In this case, there is no question that to the extent that it permits assignment of retirement benefits, state law – in this case, §§ 8.04 and 8.05 of the Texas Revised Civil Statutes Annotated article 852 – operates to frustrate the objects of ERISA, which are to ensure "that retirees, and their dependents, are the actual recipients of retirement income." *Id.* at 1759.

Turning to the anti-alienation provision of ERISA, the Court held that even though Dorothy's transfer of the retirement benefits in question was voluntary, it was nonetheless pre-empted by ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1):

> The conclusion that Congress intended to pre-empt respondents' nonbeneficiary, nonparticipant interest in the retirement plans is given specific and powerful reinforcement by the pension anti-alienation provision.

Boggs v. Boggs, 117 S. Ct. at 1765.

29 U.S.C. § 1056(d)(1) states that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *Id.* This Court noted that anti-alienation provisions are "potent mechanisms to prevent the dissipation of funds." *Id.* According to the Court, they can " 'be seen to bespeak a pension law protective policy of especial intensity: Retirement funds shall remain inviolate until retirement.' J. Langbein & B. Wolk, Pension and Employee Benefit Law 547 (2d ed. 1995)." *Id.*

In keeping with the inviolate nature of the anti-alienability provision, the Court noted that "ERISA's pension plan anti-alienation provision is mandatory and contains only two explicit exceptions, see §§ 1056(d)(2), (d)(3)(A)," neither of which was applicable to the *Boggs* case nor is applicable to this case. *Id.*

In their motions for summary judgment, and in response to Casey's motion for summary judgment, OTS and TSLD argued that the anti-alienation provisions of ERISA do not apply to voluntary waivers of a worker's rights under a retirement plan. According to OTS and

TSLD, only involuntary alienation of a worker's retirement benefits is precluded by § 1056(d)(1). This Court's opinion in *Boggs* bespeaks the falsity of this position.

The Court noted that the plain language of § 1056(d)(1) prohibits "**assignment** or alienation." (emphasis added). *Id.* The Court acknowledged the definition of this phrase as "any direct or indirect arrangement whereby a party acquires from a participant or beneficiary" an interest enforceable against a plan to "all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." *Id.* In *Boggs*, the Court applied this definition to Dorothy's voluntary purported transfer of retirement benefits to her sons under her will and concluded that it was prohibited by the anti-alienation provision of ERISA. *Id.* at 1767. Accordingly, the retirement plan survivor annuity was held to be properly payable to Sandra under the plan, rather than to Dorothy's sons pursuant to Dorothy's otherwise valid (and voluntary) transfer of them in her will. *Id.*

While the district court should not be blamed for its incorrect analysis of the ERISA pre-emption and anti-alienability issues involved in this appeal, the circuit court should have known to apply *Boggs* properly to the facts of this case. The district court entered the order granting OTS and TSLD's motions for summary judgment in April of 1997, and *Boggs v. Boggs* was not handed down until approximately 1½ months later in early June of 1997. While the district court's incorrect analysis is understandable (especially if it relied in any manner on the Fifth Circuit's opinion affirming the district court's judgment in *Boggs v. Boggs*, which was then reversed by

this Court), it is also incorrect, and should be remedied. This Court has just such an opportunity in this appeal.

III. Does res judicata apply to this case when the state administrative order in question does not address the same matters as are involved in this lawsuit and does not involve all of the same parties?

The district court and circuit court both held that Casey is "barred from collaterally attacking the validity of the order" in question. Appendix at 19a-22a. This holding was error.

Texas law governs the preclusive effect of a judgment rendered by a Texas court, and by analogy, a Texas administrative agency. *See Britton v. Seale*, 81 F.3d 602, 606 (5th Cir. 1996); *Heller Fin. v. Grammco Computer Sales*, 71 F.3d 518, 523 n. 4 (5th Cir. 1996).

"A court may invoke the doctrine of res judicata to bar consideration of a claim already presented to a Texas court upon finding: '(1) that the prior judgment was rendered by a court of competent jurisdiction; (2) that there was a final judgment on the merits; (3) that the parties, or those in privity with them, are identical in both suits; and (4) that the same cause of action is involved in both suits.' *Sutherland v. Cobern*, 843 S.W.2d 127, 130 (Tex.App. – Texarkana 1992, writ denied)." *In re Camp*, 59 F.3d 548, 550 (5th Cir. 1995).

With regard to the third of these elements (that the parties, or those in privity with them, are identical in both suits) there is definitely noncompliance. Neither the ESOP Trustee (Rhoades), who was holder of title and was

in possession of the ESOP benefits at the time the administrative orders were signed, nor the ESOP itself were parties to the TSLD's administrative order or the OTS' administrative order.

Additionally, as a beneficiary of Casey's account under the Plan, Casey's wife, Linda, has an interest in the retirement benefits at issue. Linda Casey was not a party to the prior administrative matter. In fact, Linda Casey is not a party to this lawsuit. Nevertheless, OTS and TSLD contend that they can foreclose her interest in the retirement benefits at issue without her presence by application of res judicata. The cases cited above hold otherwise, requiring identity of parties. *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 179 (5th Cir. 1997). Accordingly, the district and circuit courts below erred in purporting to adjudicate Linda Casey's rights by res judicata in her absence.

With regard to the fourth of these elements (that the same cause of action be involved in both suits), the Supreme Court of Texas has stated that "[a] subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit." *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex. 1992).

In this suit, TSLD and Casey are litigating the meaning and scope of the TSLD's consent order as it applies to claims of TSLD and Casey which have arisen since the entry of the state-based order. TSLD and Casey's claims in this lawsuit could not have been litigated in the prior

suit, since the claims arise out of interpretation of the final judgment rendered in the prior suit.

Accordingly, the district and circuit courts erred in purporting to adjudicate Michael Casey's rights vis-a-vis the state-based order by application of res judicata in the district court below.

IV. Does 12 U.S.C. § 1818(i)(1) prevent a district court from exercising jurisdiction to determine whether the administrative order in question is effective to resolve a subsequent dispute?

The district court order of April 23, 1997, states as follows:

> The relief sought by Casey in the instant case unquestionably falls within the scope of § 1818(i)(1)'s preclusionary language. Therefore, the Court does not have the jurisdiction to determine the validity of the OTS Order.

This language was affirmed by the circuit court in its entirety. Appendix at 7a-11a.

The district and circuit courts' overly broad reading of § 1818(i)(1) and its applicability to the dispute in this case constitutes reversible error.

12 U.S.C. § 1818(i)(1) states, in relevant part, "[E]xcept as otherwise provided in this section . . . no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice of order under any such section, or to review, modify, suspend, terminate or set aside any such notice or order."

Judge Gilmore erred in applying section 1818(i)(1) to this case because Casey did not ask the district court or the circuit court to "review, modify, suspend, terminate or set aside" the cease and desist orders in question. Casey only asked the district and circuit courts to rule upon the legal effect of the orders that are in place upon present and future conduct and rights of Casey, OTS, TSLD and Rhoades – not to "review, modify, suspend, terminate or set aside" the orders themselves. This Court should hold that OTS, TSLD and Rhoades are not entitled to the summary judgment relief they obtained for two reasons: (1) because Casey's purported assignment of his Plan account is void as a matter of law, and (2) because OTS and TSLD failed to establish that Casey is the only person who has an interest in the $77,064.04 that remained in Casey's ESOP account. In other words, in the parlance of section 1818(i)(1), the OTS and TSLD cease and desist orders were not "effective" because they required the doing of an illegal act – specifically, divestiture of plan benefits unqualifiedly protected by Congress through enactment of the anti-alienation clause in ERISA.

A. Casey's Purported Assignment of his Plan Account is Void.

The final administrative order issued by OTS was directed to only one individual, to wit: Casey. In the order, Casey stipulates and agrees that he will "forfeit, waive and release" a described asset. Implicit in the order's directive is the assumption that Casey has good title to the described asset and has the authority and power to convey it. Both of these assumptions are incorrect.

As to title, sections 4.13 and 12.1 of the ESOP Plan and Trust state:

> 4.13 *Rights in Trust Assets*. No such allocations, adjustments, credits or transfers shall ever vest in any Member any right, title or interest in the Trust Fund except at the times and upon the terms or conditions set forth below. Such Trust Fund shall, as to all Accounts of Members, be a commingled fund, and all securities purchased or otherwise acquired by the Trustee under the Plan shall be issued in the name of the Trustee for the FirstBanc Savings Association Employee Stock Ownership Plan,. . . .

> 12.1 *Acceptance and Holding of Funds*. The Trustee, as prescribed in Article I hereof, shall retain, manage, administer and hold the Trust Fund in accordance with the terms of this Plan. . . .

As to the power to convey, section 20.3 states:

> 20.3 *Nonalienation*. No benefit payable or to become payable under the Plan will, except as otherwise specifically provided by law, be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, or charge, and any attempt to so anticipate, alienate, sell, transfer, assign, pledge, encumber, or charge the same by a Member or Beneficiary prior to distribution as herein provided shall be absolutely and wholly void, whether such conveyance, transfer, assignment, mortgage, pledge or encumbrance be intended to take place or become effective before or after the expiration of the period herein fixed for the continuance of the said Trust estate; . . .

A plain reading of the plan provisions – which were available to OTS and TSLD prior to the drafting of the orders (since the orders resulted from OTS and TSLD's review of Casey's administration of the Plan) – establishes that Casey did not own the Plan account or its proceeds at the time he signed the orders, and that Casey had no authority or power whatsoever to transfer his account under the Plan or assets contained therein. As a result, Judge Gilmore's summary judgment holding to the contrary, and the circuit court's order affirming that ruling in its entirety, is incorrect as a matter of law.

B. The district and circuit courts improperly adjudicated the rights of persons not parties to the district court lawsuit.

The orders state that Casey shall "forfeit, waive, and release any ESOP benefits, interests, distribution or claim for ESOP benefits, interests, and distributions ("ESOP Benefits")." The orders do not state or require that Casey's designated plan beneficiaries "forfeit, waive, and release" any of their interest in the Plan. Under the Plan, if Casey dies before the Plan benefits are fully paid, the remainder of those benefits go to his primary beneficiary. If Casey's primary beneficiary predeceases Casey, or is otherwise not entitled to receive the Plan benefits, then Casey's contingent beneficiary or beneficiaries are entitled to receive the benefits. These provisions are required by ERISA. *See* 29 U.S.C. §§ 1055(a), 1055(c).

Casey believes, for the reasons set forth in part I of this petition, that any attempt, voluntary or involuntary, to divest him of his retirement benefits is illegal, and

therefore void as a matter of law. Nevertheless, if this Court somehow disagrees with that contention, then to the extent that Judge Gilmore's summary judgment order divests Casey's primary beneficiaries and/or contingent beneficiaries of their rights under the Plan: (a) such was not required by the express language of the orders, and (b) the effect of that ruling would be that Judge Gilmore adjudicated the rights of persons who were not parties to the orders, who were not parties to this lawsuit in the district court, and who are not parties to this appeal. Fundamental notions of due process prevent courts from adjudicating the rights of persons not before it:

> In *Martin v. Wilks*, 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989), the Court firmly stated that non-parties to a judgment are not normally bound by that judgment. *Id.* at 761-62, 109 S. Ct. at 2184, 104 L. Ed. 2d at 844. It then concluded that a third party is entitled to have a dispute readjudicated insofar as it regards him or her, even if he or she knowingly passed up the opportunity to intervene. *Id.* at 765, 109 S. Ct. at 2186, 104 L. Ed. 2d at 846 ("knowledge of a lawsuit" and "opportunity to intervene" do not bind non-party to judgment or decree).

United States v. Schwimmer, 968 F.2d 1570, 1577 (2d Cir. 1992).

Assuming that this Court does not agree that Casey's purported waiver of his retirement benefits is void and therefore unenforceable, the most relief that OTS or TSLD should have obtained in the trial court under the orders as they were drafted is to obtain an order to Michael Casey to require him to sign a waiver of his interest in his

Plan account. By going a step further and ordering distribution of Casey's account under the Plan, Judge Gilmore interpreted the orders more broadly than they were written, and adjudicated the rights of Casey's beneficiaries and/or contingent beneficiaries when they were not parties to the lawsuit, and improperly gave legal force and effect to Casey's agreement to alienate the proceeds of his retirement account. That was error. Strangely, the United States Court of Appeals for the Fifth Circuit either failed or refused to address this contention at all in its opinion, or on petition for rehearing.

An illustration will prove the unfortunate effect of the district and circuit courts' rulings. Assume that Defendant Doe signs an agreed order requiring him to "forfeit, waive, and release any claim or interest" he has in real property to Paul Plaintiff. Assume further that Paul Plaintiff believes that Defendant Doe owns the United States Supreme Court building in downtown, Washington, District of Columbia. By virtue of the agreed order, may a district court enter an order awarding Paul Plaintiff title to the United States Supreme Court building located in downtown Washington, District of Columbia? Of course not. Defendant Doe did not own the Supreme Court building at the time the agreed order was signed, he didn't have power to convey the Supreme Court building subsequent to the order being signed, and the district court had no power to adjudicate the rights of the United States of America (the actual owner of the United States Supreme Court building) without making the United States a party to the lawsuit.

The same analysis applies here. Casey did not own the asset in question – the Trustee did, for the use and

benefit of Casey and his beneficiaries and/or contingent beneficiaries. Casey did not have the legal ability to transfer or assign the asset in question – ERISA prohibits it. The district court did not have the power to adjudicate the rights of parties not present before it – the beneficiaries and/or contingent beneficiaries. It is for these reasons that Casey's purported transfer and/or assignment of his Plan account is void and that Judge Gilmore erred in ordering disbursement of the remaining proceeds of Casey's Plan account to other members of the Plan.

V. Does a district court abuse its discretion in awarding attorney's fees and expenses for what in essence amounted to a trustee violating his contractual and statutory duties owed to Casey and the other Plan members, in filing a premature lawsuit, and for all time and expenses involved in the district court proceeding?

Judge Gilmore awarded Rhoades almost $24,000 in legal fees. Appendix at 40a. She did so based upon the fact that Rhoades indicated that his attorneys had incurred substantial amounts of time expenditures in the handling of this matter, and because Rhoades portrayed himself to be a "disinterested stakeholder." That was error.

Rhoades filed his interpleader action pursuant to 28 U.S.C. § 1335. That statute permits a person to file an interpleader action when "two or more adverse claimants . . . are claiming or may claim to be entitled to such money or property." 28 U.S.C. § 1335(a)(1). In this case, Rhoades named as defendants Casey, OTS and TSLD, along with a global naming of the other members of the

Plan. The problem is that from the face of its complaint for interpleader, Rhoades never states, and indeed OTS and TSLD never take the position that, OTS and/or TSLD are claiming a right to the retirement benefits in question. Further, Rhoades never states, and the district court record never reflects, that any of the other members of the Plan ever made a demand or request to receive Casey's retirement benefits. Accordingly, in this case, there were not "two or more adverse claimants . . . [who] are claiming or may claim to be entitled to such money or property." 28 U.S.C. § 1335(a)(1). Accordingly, Rhoades never should have brought this interpleader action, and the district court erred in overruling Casey's motion to dismiss for failure to state a claim upon which relief could be granted. Rhoades should not be awarded attorney's fees and expenses for the bringing of a defective interpleader action that never should have been brought in the first place.

This Court's jurisprudence regarding the propriety of awarding a plaintiff-in-intervention his or her attorney's fees is scant. The controlling principles of this area of the law were recently summarized by the United States Bankruptcy Court for the Eastern District of Pennsylvania in a suit involving CF Motor Freight Company, in relevant part, as follows:

> We do note, as is observed in 4 J. MOORE FEDERAL PRACTICE, P 22.06, at 22-99 (3d ed. 1997), that "there is no provision in either the Federal Interpleader Act or Rule 22 concerning the award of attorney's fees or costs to the stakeholder in an interpleader proceeding." However, that text, *id.*, at 22-99 to 22-100, goes on to state that despite this sparse express

authorization, modern federal practice follows the traditional equity rule that gives the trial court discretion to allow a disinterested stake holder to recover attorney's fees and costs from the stake itself. . . . As we stated in *In re Temp-Way Corp.*, 80 B.R. 699, 705-06 (Bankr. E.D. Pa. 1987), in reducing a stakeholder's request for $2,645 to $460.00, such an award is likely to be nominal, [3A J. MOORE, FEDERAL PRACTICE, P 22.16[2],] at 22-174 [(2d ed. 1987)] . . . because "the only services for which compensation is normally sought are those connected with the preparation and filing of a single pleading [for interpleader]." *Id.* at 22-173. As was aptly stated by the Court in *Hunter v. Federal Life Insurance Co.*, 111 F.2d 551, 557 (8th Cir. 1940):

> Under ordinary circumstances there would be no justification for seriously depleting the fund deposited in court by a stakeholder through the allowance of large fees to his counsel. The institution of a suit in interpleader, including the depositing of the fund in the registry of the court and procuring of an order of discharge of the stakeholder from further liability, does not usually involve any great amount of skill, labor or responsibility, and, while a completely disinterested stakeholder should not ordinarily be out of pocket for the necessary expenses and attorney's fees incurred by him, the amount allowed for such fees should be modest.

Accord, e.g., In re OEM Industrial Corp., 135 B.R. 247 (Bankr. W.D. Pa. 1991) (interpleader's demand for $12,938.62 in fees and costs is reduced to $1,000 fees plus $120 costs).

CF Motor Freight v. Schwartz (In re De-Pen Line), 215 B.R. 947, 951-52 (Bankr. E.D. Pa. 1997). The district court's award and circuit court's affirmance of an award of approximately $24,000 in interpleader attorneys' fees under the facts presented directly conflicts with the ruling of the Court of Appeals for the First Circuit in *Ferber v. Ondrick*, 310 F.2d 462, 467 (1st Cir. 1967), wherein the court of appeals stated as follows:

> An interpleader fee is usually n5 awarded out of the fund to compensate a totally disinterested stakeholder who had been, by reason of the possession of the fund, subjected to conflicting claims through no fault of its own. By its very nature it is of a relatively small amount, simply to compensate for initiating the proceedings. As to the $46,744 Ferber was undoubtedly a disinterested stakeholder. Obviously, however, the great bulk of its efforts were in resisting Ondrick's counterclaim, as to which the court properly pointed out it was in no way disinterested or entitled to a fee. *See Standard Surety & Casualty Co. v. Baker*, supra, 105 F.2d at 580.

In this case, Rhoades failed to distinguish in his motion for attorney's fees between conduct necessary to the preparation and filing of the petition for interpleader, and all other tasks performed while Rhoades maintained his status as plaintiff-in-intervention in the district court. Rhoades had the burden of establishing what attorney's fees were attributable to the work that is compensable under *CF Motor Freight* and the other authorities cited *infra*. His failure to meet that burden necessitates reversal of Judge Gilmore's breathtaking award of approximately 1/3 of the entire amount at stake in this interpleader action.

Another reason for denying attorney's fees in this matter is the fact that Rhoades was the Plan's trustee. As such, he was charged by statute and by contract with the obligation of administering the Plan in accordance with the terms of the Plan. According to the United States Supreme Court, Rhoades owed Casey the obligation to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. § 1104(a)(1). The assets of a plan, . . . are "held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. § 1108(a)(2)." *Boggs v. Boggs*, 117 S. Ct. at 1762-63.

Rhoades repeatedly attempted to portray himself as a disinterested stakeholder. His representations to the trial court belie that status. In his response to Casey's motion to dismiss for failure to state a claim upon which relief could be granted, Rhoades expressly took the position that Casey is not entitled to receive any of the interpleaded funds because he waived his right to them. Doc. 17 at 2. A litigant who attempts to direct a court in the manner in which interpleaded funds are disseminated is hardly a "disinterested stakeholder," as required by cases construing requests for attorney's fees from plaintiffs-in-intervention. *See Trustees of the Dirs. of America-Producer Pension Ben. Plans v. Tise*, 1996 U.S. Dist. LEXIS 10657 (N.D. Cal. 1996) ("Ordinarily, a disinterested stakeholder would recover the relatively small amount of fees and costs incurred in filing the interpleader action and serving the parties. In this case, however, the Plan did not simply deposit the funds with the Court and behave like a neutral stakeholder in a typical statutory interpleader

action. Rather, the Plan litigated this case vigorously, opposing Tise's entitlement to the funds as if it had brought an action under section 1132 to enjoin practices that violate ERISA. Under these circumstances, it would be inappropriate to award the substantial fees and costs sought.").

No evidence in the district court established that the award of almost $24,000 in attorney's fees was reasonable for the simple act of filing a petition-in-interpleader in this case. Rhoades, as movant, had the burden to establish the reasonableness of his fee for the necessary services rendered as a matter of law. Fed. R. Civ. P. 56. His failure to do so renders the award of almost $24,000 in attorney's fees improper.

In addition to the foregoing, the interpleader lawsuit would not have been necessary if Rhoades had communicated with OTS, and found out that a lawsuit was about to be filed as to the very same subject matter.

CONCLUSION

The court of appeals erred in holding that the provisions of ERISA do not pre-empt the state statutes in question. The courts compounded that error by holding that even if ERISA pre-emption applied, the anti-alienation provision of ERISA would not prevent a plan participant from voluntarily and knowingly assigning his right to plan benefits away to third parties.

This Court's opinion and judgment in *Boggs v. Boggs* establishes that both of these rulings are incorrect. The

court of appeals compounded these errors and abused its discretion by awarding Rhoades, the Plan's trustee, almost $24,000 in attorney's fees for filing a simple interpleader lawsuit that, both by statute and contract, he should not have undertaken consistent with his fiduciary obligations to Casey and the other participants under the Plan. This Court has the power to right these wrongs. Michael E. Casey respectfully requests this Court to exercise that power in this case.

WHEREFORE, PREMISES CONSIDERED, Petitioner, Michael E. Casey respectfully prays that this Honorable Court grant the petition for certiorari sought herein, and upon doing so, reverse and/or vacate the judgments and orders of the court of appeals and the district court, affirming and awarding summary judgment to the Office of Thrift Supervision and the Texas Savings & Loan Department, denying Michael E. Casey's motion for summary judgment, and granting Rhoades' motion for attorney's fees and expenses and for discharge, and that the Court remand this cause for further proceedings consistent with this Court's opinion and judgment.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20819

ROBERT E. RHOADES, Trustee for the FirstBanc Savings Association Employee Stock Ownership Plan,

Plaintiff-Appellee,

versus

MICHAEL E. CASEY; ET AL.,

Defendants,

MICHAEL E. CASEY,

Defendant-Counter Claimant-Appellant,

versus

THE TEXAS SAVINGS AND LOAN DEPARTMENT; KATHY BARNES; VIVIAN WECHIE,

Defendants-Appellees,

and

THE OFFICE OF THRIFT SUPERVISION,

Defendant-Counter Defendant-Appellee.

****

DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION, US DEPARTMENT OF THE TREASURY,

Plaintiff-Appellee,

versus

MICHAEL E. CASEY,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

(Filed Dec. 3, 1999)

Before KING, Chief Judge, SMITH and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Defendant-Appellant Michael E. Casey appeals the district court's grant of summary judgment in favor of the Office of Thrift Supervision and the Texas Savings and Loan Department. The appellant also challenges the district court's order which distributed the disputed retirement benefits to other retirement plan participants, and the award of attorney's fees to Plaintiff-Appellee Robert Rhoades. For the following reasons we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from a complicated set of factual and procedural circumstances. Michael E. Casey ("Casey") was the first president and chief executive officer of FirstBanc. FirstBanc's Employees Stock Ownership Plan ("ESOP") was established May 1, 1987. Casey was the plan's trustee and an ESOP participant.

In 1991, the Office of Thrift Supervision ("OTS") and the Texas Savings and Loan Department ("TSLD") raised questions regarding the administration of the FirstBanc ESOP. The OTS and TSLD commenced a formal examination of FirstBanc and the FirstBanc ESOP. The agencies investigated to determine whether Casey had committed violations of banking regulations, breached fiduciary

duties, and engaged in unsafe or unsound banking practices. These investigations led to settlement negotiations between OTS, TSLD and Casey. In order to avoid the initiation of administrative litigation against him by OTS and TSLD on June 21, 1993 Casey entered into two separate consent agreements titled Stipulation and Consent to Issuance of Order to Cease and Desist ("consent agreements") with OTS and TSLD respectively. In the consent agreements signed by Casey, he assented to issuance of the cease and desist orders ("cease and desist orders" or "orders"). These consent agreements further stated that Casey agreed to comply with the cease and desist orders that would be forthcoming from OTS and TSLD. Casey also stipulated that the orders complied with all requirements of law. The consent agreements clearly explained that the cease and desist orders were final orders, effective, and fully enforceable by the agencies. Casey also waived his right to seek judicial review of the orders or to otherwise challenge the validity of the order.

The cease and desist orders issued by OTS and TSLD were comprehensive. The orders stripped Casey of his association with FirstBanc as a director and of his position as trustee of the ESOP. Most importantly for this appeal, the orders stated that Casey would waive his rights and interests in his ESOP benefits. The OTS order stated in part, "Casey shall forfeit, waive, and release any ESOP benefits, interests, distribution or claim for ESOP benefits, interests, and distributions."[1] In April 1995, over

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[1] The TSLD order contained virtually the same language except it stated that Casey would "hereby" waive his ESOP benefits.

two years after the consent agreements were signed and the orders had been issued, the OTS Midwest Regional director sent a letter to Casey requesting that he execute a waiver of his ESOP benefits as required by the order. Casey, responding to the letter through counsel, refused to execute the waiver.

In August 1995, Robert Rhoades, the new trustee of the FirstBanc ESOP, dissolved the FirstBanc ESOP. At that time, Rhoades distributed the ESOP funds to the ESOP participants or their beneficiaries. OTS and TSLD wrote to Rhoades and reminded him of the orders in place against Casey and asserted that Casey's ESOP benefits were subject to the orders which required Casey to forfeit and waive his benefits. Casey also contacted Rhoades and disputed the validity of the orders. Casey requested that Rhoades release and distribute to him his portion of the ESOP fund.

On November 1, 1995, Rhoades filed an interpleader action, and subsequently deposited into the Registry of the Court the $77,064.04 in dispute. OTS, TSLD, Casey, and all of the other ESOP plan participants were named as defendants in the interpleader action. This interpleader action was filed in the U.S. District Court for the Southern District of Texas and was assigned to Judge Vanessa Gilmore.

One month later in December 1995, OTS filed a Complaint for Enforcement of Order ("enforcement complaint") in the U.S. District Court for the Southern District of Texas and it was assigned to Judge David Hittner. The enforcement complaint named Casey as the defendant and stated that pursuant to 12 U.S.C.

§ 1818(I)(1) OTS was entitled to enforcement of the outstanding final order, including obtaining an order from the district court directing Casey to waive his ESOP benefits. On April 23, 1996 OTS filed an unopposed motion to consolidate the Rhoades interpleader action and the OTS enforcement complaint. On April 26, 1996 Judge Gilmore signed an order granting OTS's motion to consolidate the cases.

On February 28, 1997 OTS, TSLD and Casey filed motions for summary judgment. On the same day Rhoades filed a motion for discharge as plaintiff in the interpleader action and for attorney's fees. On April 23, 1997, the district court granted OTS and TSLD's motions for summary judgment denying Casey's motion for summary judgment. The district court also granted Rhoades' motion for attorney's fees. The district court refused to discharge Rhoades as a plaintiff until the court entered a final order distributing the ESOP benefits that were in the court's registry. On June 3, 1997, the district court entered an order that distributed the funds held in the court registry as follows: $23,955.21 to Rhoades in attorney's fees, and the remaining $53,108.83 plus all accrued interest to be distributed to the ESOP participants in the same proportion as the previous disbursements made by Rhoades.[2]

In the district court's order granting summary judgment the court stated that the clear language of 12 U.S.C.

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[2] On June 19, 1997 Casey filed a pleading styled as a motion for new trial. On March 29, 1998 the district court denied Casey's motion for new trial because it was untimely, coming after the ten day period set forth in F. R. Civ. P. 59(e).

§ 1818(i)(1) defined the district court's jurisdiction to only allow the court to enforce the OTS order, and that a district court should not review or modify the terms of an OTS order. The district court also found that even if it had jurisdiction to modify or rescind the OTS order, the OTS order did not violate the anti-alienation provisions of ERISA. In regards to the TSLD order the district court held that Casey was barred by res judicata from collaterally attacking the TSLD order. The district court further found that the Texas statutes which empowered TSLD to regulate state-chartered savings associations were not preempted by ERISA.

DISCUSSION

Casey argues on appeal that the district court erred in finding that it did not have jurisdiction to consider his defense to the OTS order, and also erred in finding that the OTS order did not violate the anti-alienation provisions of ERISA. Casey also challenges the district court's finding that res judicata bars his challenge to the TSLD order, and that the TSLD order is not preempted by ERISA. Finally, Casey argues that the district court abused its discretion in awarding Rhoades attorney's fees because Rhoades was not a disinterested stakeholder as required to receive attorney's fees in an interpleader action. We will consider each of these issues in turn.

A. OTS Order

This court reviews a grant of summary judgment de novo. *See Rivers v. Central and South West Corporation*, 186

F.3d 681, 682 (5th Cir. 1999). Summary judgment is appropriate, when, viewing the evidence in the light most favorable to the nonmoving party, the record reflects that no genuine issue of any material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

1. District Court's Jurisdiction under 12 U.S.C. § 1818

The district court granted summary judgment to OTS on the grounds that the 12 U.S.C. § 1818(i)(1) limits a district court's jurisdiction to the enforcement of banking agency orders. The district court found that § 1818(i)(1) expressly forbids a district court to review, suspend or terminate OTS orders. Casey argues that he did not ask the district court to review, suspend or modify the OTS order. He contends that as a defense to the OTS enforcement action he requested that the district court rule on the legal effect of the OTS order, specifically whether the OTS order was void as a matter of law because the order violated ERISA's anti-alienation provision.

Before the district court were two separate actions which the district court consolidated; the enforcement action brought by OTS against Casey, and the interpleader action brought by Rhoades naming OTS, TSLD, Casey and the other plan participants as defendants. Therefore, we will address the district court's jurisdiction in each suit separately.[3]

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[3] In the April 1997 order which granted summary judgment and in the June 1997 order which distributed the interplead

The jurisdictional scheme for a federal banking agency's cease and desist orders is set forth in the Financial Institutions Supervisory Act of 1966 (FISA), 80 Stat, 1046, as amended, 12 U.S.C. § 1818 et seq. FISA § 1818(b) gives a federal banking agency, such as OTS, the power to issue a cease and desist order against any banking institution affiliated party who the agency has reasonable cause to believe has been engaging in unsafe or unsound practices. A cease and desist order becomes effective at the expiration of thirty days after the service of the order upon the institution affiliated party, in the present case that party being Casey.[4] *See* 12 U.S.C. § 1818(b)(2).

FISA also provides a comprehensive system for judicial review of an effective cease and desist order. *See Board of Governors of Fed. Reserve Sys. of U.S. v. Mcorp Financial, Inc.*, 502 U.S. 32, 37, 112 S.Ct. 459, 463, 116 L.Ed.2d 358 (1991). A party may obtain review of the order issued by the banking agency by filing it in a Court of Appeals of the United States. *See* 12 U.S.C. § 1818(h)(2). The banking agency may apply to a United States district court for the *enforcement* of an effective and outstanding order, and the district court has the jurisdiction and

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funds, the district court does not separate discussion of the enforcement complaint and the interpleader action and how the court's jurisdiction may differ in the two matters.

[4] Casey argues that the OTS order which was issued against him as provided for in the consent agreement was not "effective", because to be an "effective" order the order must be legal, valid and enforceable. However, the statute does not impose these requirements. The statute clearly states that an order is "effective" thirty days after service of the order. *See FDIC v. Bank of Coushatta*, 930 F.2d 1122, 1125 (5th Cir. 1991).

power to order compliance with the OTS order. *See* 12 U.S.C. § 1818(i)(1) (emphasis added). The district court does not have jurisdiction to affect by injunction or otherwise the enforcement of any order, or to review, modify, suspend, terminate or set aside any order. *Id.*

The case law also outlines and clearly forecloses the jurisdiction of a district court to modify, or review banking agency orders. In *Mcorp.*, the Supreme Court held that the plain, preclusive language of § 1818(i) "provides us with clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin" administrative proceedings. *Mcorp.*, 502 U.S. at 44. This court has also found that § 1818(i) on its face is sufficient to deprive the district court of jurisdiction to review, modify or terminate banking agency disciplinary actions. *See e.g., Landmark Land Company, Inc.*, 948 F.2d 910, 912 (5th Cir. 1991); *Board of Governors of the Federal Reserve System v. DLG Financial Corp.*, 29 F.3d 993, 999 (5th Cir. 1994). Therefore, based on the plain and preclusive language of § 1818(i)(1) the district court properly concluded that it did not have jurisdiction in the enforcement action to modify or terminate the OTS order.

Casey nonetheless argues that the jurisdictional scheme of § 1818(i) is inapplicable to this case because he did not ask the district court to modify or suspend the OTS order, but instead presented a defense to the OTS order, namely that the OTS order violated the anti-alienation provision of ERISA. Casey asserts that after considering his defense, the district court had jurisdiction to find the OTS order void as a matter of law. However, if the district court had considered Casey's defense and declared the OTS order void and therefore unenforceable,

that decision would have been tantamount to the district court's modifying or terminating the OTS order. This is an action which is expressly prohibited by § 1818(i).

The proper course of action for Casey would have been for him to challenge the OTS order in this court. Casey entered into the consent agreement and the OTS order was issued in June 1993. Section 1818(h) provides that an institution affiliated party has within 30 days after the date of service of the agency order to seek review in the Court of Appeals, and request that the agency order be modified, terminated, or set aside.[5] Casey chose to disregard the OTS order by not seeking timely review of the order, not executing the waiver of his benefits, and instead waiting until OTS filed an enforcement complaint to submit his ERISA argument as a defense.[6] Therefore,

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[5] There are many cases in which an institution or institution affiliated party has challenged a banking agency's final order in the Court of Appeals, as provided for in § 1818(h). *See e.g., Pharaon v. Board of Governors of the Federal Reserve System*, 135 F.3d 148 (D.C. Cir. 1998); *Long v. Board of Governors of Federal Reserve System*, 117 F.3d 1145 (10th Cir. 1997); *Hendrickson v. FDIC*, 113 F.3d 98 (7th Cir. 1997); *Rapp v. OTS*, 52 F.3d 1510 (10th Cir. 1995).

[6] One circuit has suggested that under certain circumstances a district court does have jurisdiction to hear a party's defense to an OTS enforcement action. In *OTS v. Henry*, 43 F.3d 507 (10th Cir. 1994), OTS issued cease and desist orders against Anne Henry for participating in improper banking transactions. After issuance of the OTS order Henry filed an action in the district court seeking to enjoin OTS from enforcing the order. *See Henry*, 43 F.3d at 510. The Tenth Circuit found that the district court lacked jurisdiction to decide Henry's complaint because to decide in her favor would be "tantamount to setting aside the consent order." *Id.* at 513. The court also

the district court properly concluded that it did not have jurisdiction to declare the OTS order void as a matter of law because that action would have been equivalent to terminating or modifying the OTS order.

2. ERISA's Anti-alienation Provision

While admittedly the district court did not have jurisdiction under § 1818 to consider Casey's ERISA defense the district court did have jurisdiction to consider Casey's ERISA argument as part of the court's effort to fashion a solution to the interpleader action. The interpleader complaint specifically requested that the court determine the rights of all the named parties as to the disputed ESOP funds, and to distribute the benefits according to the court's determination. Therefore, looking through the lens of the interpleader action, instead of through the prohibitive lens of 1818(i), it was proper for the district court to resolve the ERISA issue. Due to the unusual circumstance of the unopposed consolidation of the enforcement and interpleader actions, resolution of Casey's ERISA argument was inextricably linked to a

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stated that Henry could raise her affirmative defense of fraud to challenge the OTS consent order if OTS attempted to enforce the order in the district court. *Henry* is distinguishable from the present case because Henry's defense was fraud which went to the issue of whether Henry knowingly consented to the issuance of the OTS order. In the present case there is no question that Casey knowingly and voluntarily consented to the issuance of the OTS order. Also, in *Henry* the institution affiliated party, Henry, did seek judicial review of the OTS order prior to OTS filing an enforcement action, although she brought that challenge in the district court and not the Court of Appeals.

final disposition of the interpleader action. The district court properly provided full consideration of Casey's ERISA arguments, and thus we will review this issue.

Casey argued to the district court and contends on appeal that the OTS order should be declared void and unenforceable because it violates the anti-alienation provision of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. § [sic] et seq. The anti-alienation provision of ERISA, Section 1056(d)(1) states that each pension plan "shall provide that benefits provided under the plan may not be assigned or alienated." In general, the anti-alienation provision will be read broadly as a "protective policy of special intensity" which reflects the policy that retirement funds should remain inviolate until retirement. *Boggs v. Boggs*, 520 U.S. 833, 851, 117 S.Ct. 1754, 1765, 138 L.Ed.2d 45 (1997).

However, the anti-alienation provision of ERISA is not absolute. Courts, including this one, have noted that there is an exception to ERISA's anti-alienation provision for a knowing and voluntary waiver of retirement benefits that is executed to reach a settlement. *See Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992) (holding that plan participant may execute a valid waiver of pension benefits as long as the waiver is made knowingly and voluntarily); *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 455 (7th Cir. 1991) (holding that the anti-alienation provision of ERISA manifests Congress's intent to prevent a worker from unknowingly signing away pension benefits, but does not impose a bar on settlement agreements in which benefits are knowingly and voluntarily waived).

This court in *Stobnicki v. Textron*, 868 F.2d 1460, 1465 (5th Cir. 1989) held that "a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other, and that an assignment made pursuant to a bona-fide settlement of such a controversy is not invalidated by the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1)." In *Stobnicki*, a common law husband named his brother as his beneficiary for his retirement benefits. After the husband died, his brother's successor in interest entered into a settlement agreement with the common law wife and executed an instrument that assigned to the common law wife all rights to her late husband's retirement benefits. This court upheld this voluntary assignment of retirement benefits finding that it furthered the purposes of ERISA, by not wasting retirement benefits on the costs of litigation. In *Stobnicki*, this court thoroughly examined the legislative history of ERISA and the effect that the legislative history has on the scope of the anti-alienation provision. We held that courts "will not ascribe to Congress the intent of making unreasonable law – one requiring terminal litigation rather than settlements as does the general law," and therefore the apparent statutory bar against alienation of pension benefits should yield to reason and allow benefits to be voluntarily waived for settlement purposes. *Stobnicki*, 868 F.2d at 1463-1464.

In the present case, Casey knowingly and voluntarily entered into a settlement agreement with OTS in which he agreed to waive his retirement benefits. This was a bargained for exchange in which Casey waived his benefits in exchange for substantial consideration. OTS agreed not to pursue formal administrative litigation against

Casey, which could have resulted in Casey's being ordered to pay civil penalties. This concession by OTS and TSLD was made in exchange for his promise to waive his retirement benefits. Furthermore, Casey is the ultimate sophisticated party in a transaction such as this because he was CEO of FirstBanc and trustee of the ESOP. We decline to ascribe to ERISA's anti-alienation provision an unreasonable interpretation which would frustrate knowing and voluntary settlements, such as the one entered into by Casey.

Casey argues that the Supreme Court's decision in *Boggs*, which was rendered after the district court's decision in the present case, stands for the proposition that *all* voluntary waivers of pension benefits violate ERISA's anti-alienation provision. We disagree. In *Boggs*, the pension plan participant's first wife predeceased him. In her testamentary instrument she transferred an interest in her ex-husband's undistributed pension plan benefits to the couple's children. *See Boggs*, 520 U.S. at 836, 117 S.Ct. at 1758. Under Louisiana community property law, the ex-wife was entitled to dispose of her community property interest in her husband's undistributed pension benefits in her will. *See Boggs*, 520 U.S. at 837, 117 S.Ct. at 1758. The ex-husband, who was the plan participant, did not knowingly or voluntarily waive his benefits in the plan, or enter into a settlement agreement with his ex-wife. The Supreme Court's primary holding in *Boggs* was that the Louisiana community property statute, to the extent that it allowed an ex-wife to assign her ex-husband's benefits, is preempted by ERISA. *See Boggs*, 520 U.S. at 844, 117 S.Ct. at 1762. The Supreme Court also concluded that Congress's intent to preempt state statutes that give an

interest in pension benefits to nonbeneficiary, nonparticipant interests is bolstered by ERISA's anti-alienation provision. *Boggs*, 520 U.S. at 851, 117 S.Ct. at 1765. In the present case, Casey, the plan participant, has not been divested of his rights to his pension benefits by an assignment made by a nonbeneficiary, nonparticipant third party. In this case, Casey himself, voluntarily agreed to waive his pension benefits in exchange for the agencies agreement to begin administrative litigation against him. *Boggs* did not address knowing and voluntary waivers of pension benefits by a plan participant that are made in exchange for substantial consideration. Therefore, the Supreme Court's holding in *Boggs* does not void the OTS Order. We conclude that the OTS order did not violate ERISA's anti-alienation provision, and that the district court did not have jurisdiction to modify or terminate the OTS order. Therefore, regarding the OTS enforcement complaint, the district court properly enforced the order and divested Casey of his interest in the ESOP benefits.

3. Interpleader Action

After granting summary judgment to OTS and TSLD finding that Casey had waived his rights to his ESOP benefits, in June 1997 the district court entered an order which distributed Casey's waived ESOP benefits to the other ESOP participants. Because this June 1997 order distributed Casey's waived ESOP benefits we assume that

the June 1997 order was rendered in response to the interpleader action filed by Rhoades.[7]

Rhoades filed the interpleader action pursuant to 28 U.S.C. § 1335 and FED. R. CIV. P. 22 because he considered Casey, OTS and TSLD to be adverse claimants who might claim entitlement to the ESOP funds.[8] Pursuant to 28 U.S.C. §§ 2201-2202, Rhoades also requested that the court issue a declaratory judgment setting forth the rights of Casey, OTS, and TSLD to the disputed portion of the ESOP fund. Rhoades requested that the declaratory judgment address the validity of the OTS and TSLD orders as related to Casey's rights to the funds. Rhoades also urged the district court to allow him to deposit the disputed funds in the court registry, and that the court determine the distribution of the ESOP funds as among Casey or the other plan participants, and that the funds be distributed in accordance with the court's instructions.

A district court has broad powers in an interpleader action. An interpleader action typically involves two stages. In the first stage, the district court decides whether the requirements for rule or statutory interpleader action have been met by determining if there is a

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[7] Neither in the June 1997 order nor the April summary judgment order did the district court discuss its jurisdiction or authority to distribute the ESOP funds that were in question.

[8] A prerequisite to filing an interpleader action is that there must be a single, identifiable fund. The legislative purpose of an interpleader action is to remedy the problems posed by multiple claimants to a single fund, and to protect a stakeholder from the possibility of multiple claims on a single fund. *Wausau Insurance Companies v. Gifford*, 954 F.2d 1098, 1100 (5th Cir. 1992).

single fund at issue and whether there are adverse claimants to that fund. Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: Civil 2d § 1714 (1986). If the district court finds that the interpleader action has been properly brought the district court will then make a determination of the respective rights of the claimants. *Id.* When there is no genuine issue of material fact the second stage may be adjudicated at summary judgment, and if there is a trial each claimant must prove their right to the fund by a preponderance of the evidence. *Id.* After entering a judgment in the interpleader action the district court also has the power to make all appropriate orders to enforce its judgment. 28 U.S.C. § 2361. In an interpleader action the district court may also enter an order restraining the claimants from instituting any proceeding affecting the property until further order of the court. *Id.*[9]

This was a proper interpleader action. There was a single fund, the ESOP benefits, with several adverse parties who could have attempted to claim these funds. At the time the ESOP was dissolved, Casey informed Rhoades that he sought to retain his interest in the ESOP benefits.[10] At this same time OTS and TSLD informed

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[9] The interpleader complaint also requested that the court enter a declaratory judgment. Under the declaratory judgment statute the district court may declare the rights and other legal relations of any interested party and enter any necessary or proper relief based on the declaratory judgment. 28 U.S.C. §§ 2201-2202.

[10] Casey also claims that his wife as a beneficiary also has an interest in the ESOP benefits. However, his wife was never a party in the interpleader action, therefore this court will not address Casey's claims that his wife may have had an interest in the ESOP benefits.

Rhoades that Casey had waived the benefits. Because this was a proper interpleader action in the second stage of the interpleader it would be proper for the district court to determine the rights of Casey, OTS, TSLD and the other ESOP participants to the funds. The district court had previously determined in the April 1997 summary judgment order and memorandum opinion that the OTS and TSLD orders were enforceable. Based on this decision, it was reasonable for the district court in its determination of the parties' rights to the funds as demanded by the interpleader action to conclude that Casey had waived his rights to the ESOP benefits. OTS and TSLD had never asserted any right to obtain the waived ESOP benefits. The agencies had only requested that based on the orders and consent agreements Casey should waive his rights to the ESOP benefits. Once the district court had made the determination that Casey had waived his rights to the ESOP benefits, and the agencies claimed no right to obtain the ESOP benefits it was clear that the benefits should not be distributed to Casey or the banking agencies. Therefore, the proper resolution would be to return Casey's waived ESOP benefits to the general ESOP fund. However, the ESOP had already been dissolved, and the rest of the ESOP funds had already been distributed to the ESOP participants. The interpleader statute gives a district court the power to enter orders to effectuate its judgments, and Rhoades' interpleader complaint specifically requested that the district court decide how the ESOP benefits should be distributed and distribute the benefits according to the court's order.[11]

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[11] Other parties to the interpleader action also requested that the waived ESOP benefits be distributed by the district

Therefore, based on the general powers of a district court in an interpleader action and the particular circumstances of this case the district court did have the authority to enter an order to distribute Casey's waived ESOP benefits to the other ESOP participants.

B. TSLD Order

The district court also granted summary judgment to TSLD finding that the TSLD order was fully enforceable. This court reviews the district court's grant of summary judgment de novo. *See Rivers v. Central and South West Corporation*, 186 F.3d 681, 682 (5th Cir. 1999).

Casey argues that the district court erred in finding that res judicata barred him from collaterally attacking the TSLD Order.[12] Texas law governs whether a claim is barred by the existence of a judgment rendered by a

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court. The ESOP participants were named as defendants in the interpleader action. Two of these participants, Vivian Wechie and Kathy Barnes, filed answers to the interpleader complaint and requested that the court award them any dollar amount to which they were legally entitled.

[12] This discussion is included to allow this court to fully address the appellant's arguments as presented. The OTS order that was the subject of the discussion in Part A concerned the same ESOP benefits that are at issue in the TSLD order. Therefore, our holding that the district court properly enforced the OTS order and properly distributed the waived ESOP benefits pursuant to the interpleader action, renders our determination of the validity of the TSLD order inconsequential. TSLD did not file a brief in this appeal and did not appear at oral argument. However, the TSLD order was discussed by the district court and is submitted by the appellant as an issue for review.

Texas administrative agency. *See Britton v. Seale*, 81 F.3d 602, 606 (5th Cir. 1996).[13] The doctrine of res judicata applies to relitigation of claims previously determined by an administrative agency.[14] *Harrison v. Gemdrill International, Inc.*, 981 S.W.2d 714, 718 (Tex. App – Houston 1998, writ denied); *see also Montgomery v. Blue Cross & Blue Shield*, 923 S.W.2d 147, 150 (Tex. App. – Austin 1996, writ denied). To determine whether an action is barred by res judicata the court should consider whether the prior judgment was rendered by a court with proper jurisdiction, whether there was a final judgment on the merits, that the parties are identical in both actions, and that the same cause of action is involved in both suits. *McDaniel v. Camp*, 59 F.3d 548, 550 (5th Cir. 1995) (citing *Sutherland v. Cobern*, 843 S.W.2d 127, 130 (Tex. App. – Texarkana 1992, writ denied)).

First, TSLD had proper jurisdiction to issue the cease and desist order against Casey. Sections 8.04, 8.05 gave TSLD as an administrative agency the power to regulate savings associations and to issue orders to prevent unsafe or unsound practices by the savings association or parties affiliated with the savings association. Second, the TSLD Order was a final order issued based on the consent agreement between Casey and TSLD. The order clearly

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[13] This case discusses the preclusive effect of a judgment rendered by a Texas court, by analogy Texas law also governs the preclusive effect of judgments rendered by a Texas administrative agency.

[14] While the TSLD Order was not the result of a judgment by the administrative agency, it was the product of a settlement agreement entered into by the administrative agency and Casey for Casey to avoid a full administrative hearing.

stated that it was a final order, and that Casey waived his right to a full administrative hearing on the merits, and also waived his right to appeal the order. Subsequent to issuance of the TSLD order, Casey never requested an administrative hearing on the merits of the TSLD order, and did not seek judicial review of the order. Casey claims that the parties to the interpleader action are not the same as the parties that entered into the consent agreement. Casey claims that his wife, as the named beneficiary of his ESOP benefits, and Rhoades as the plaintiff in the interpleader action, are new parties, and thus his claims should not be barred by res judicata. We disagree. Casey's wife never sought to intervene in the interpleader action and therefore any claims regarding her interests will not be considered on appeal. Rhoades is not a new party to the action because he does not assert any personal claim to the ESOP benefits. Therefore, the district court properly found that Casey's claim that the TSLD order is unenforceable is barred by res judicata.

Casey also argues that TEX. REV. CIV. STAT. ANN. art. 852 §§ 8.04, 8.05 which authorized TSLD to regulate state-chartered savings associations, are preempted by ERISA. Because Casey's challenge to the enforceability of the TSLD order is barred by res judicata we do not reach Casey's argument that §§ 8.04, 8.05 are preempted by ERISA. Furthermore, TEX. REV. CIV. STAT. ANN. art. 852 §§ 8.04,8.05 were repealed by the Texas Legislature effective September of 1997. Therefore, the issue of whether these statutes are preempted by ERISA is arguably moot. Therefore, we conclude that the district court properly granted summary judgment in favor of TSLD.

C. Attorney's Fees

Casey admits that he failed to timely challenge the district court's award of $23,955.21 in attorney's fees to Rhoades. Because Casey challenges the award of attorney's fees for the first time on appeal we will review the award for plain error. Under the plain error standard we will reverse the district court's award of attorney's fees only if the award implicates the substantial rights of the parties and seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Crawford v. Falcon Drilling Co.*, 131 F.3d 1120, 1124 (5th Cir. 1997).

A district court has the authority to award reasonable attorney's fees in interpleader actions. *See Corrigan Dispatch Company v. Casa Guzman, S.A.*, 696 F.2d 359, 364 (5th Cir. 1983). The award of attorney's fees is in the discretion of the district court, and fees are available when the interpleader is a disinterested stakeholder, and is not in substantial controversy with one of the claimants. *See Phillips Petroleum Company v. Hazelwood*, 534 F.2d 61, 63 (5th Cir. 1976). Rhoades submitted to the district court an application for attorney's fees which detailed his attorney's actions to properly represent him in the interpleader action. An affidavit submitted by Rhoades' attorney stated that the attorneys engaged in the necessary work for an interpleader action including drafting the original interpleader complaint, locating all of the ESOP participants, answering Casey's motions to dismiss the interpleader action, and participating in settlement discussions. Although the award of $23,951 is a large sum in attorney's fees for an interpleader action, Rhoades did attempt to be discharged from the proceeding in February 1997. However, the district court declined to discharge

Rhoades until a final distribution of the ESOP benefits was made.

Casey argues that Rhoades should not [sic] considered a "disinterested stakeholder" as required to receive attorney's fees in an interpleader action, because Rhoades attempted to direct the court to distribute the ESOP benefits in OTS and TSLD's favor. However, after a careful review of the record we disagree with Casey's contention that Rhoades participated in the litigation as an adversary to Casey's interests or as an ally to OTS and TSLD. Therefore, after a thorough review of the record we find that the court did not commit plain error in awarding Rhoades attorney's fees.

CONCLUSION

For these reasons we affirm the district court's grant of summary judgment to OTS and TSLD, the order which distributed the waived ESOP benefits, and the award of attorney's fees to Rhoades.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT E. RHOADES, AS TRUSTEE FOR THE FIRSTBANC SAVINGS ASSOCIATION EMPLOYEE STOCK OWNERSHIP PLAN	§	**CIVIL ACTION NO. H-95-5101**
versus	§	
MICHAEL E. CASEY, ALL OTHER PARTICIPANTS IN THE FIRSTBANC EMPLOYEE STOCK OWNERSHIP PLAN, THE OFFICE OF THRIFT SUPERVISION, AND THE TEXAS SAVINGS AND LOAN DEPARTMENT	§	

ORDER

(Filed April 23, 1997)

Pending before the Court is Plaintiff's Robert Rhoades' Motion for Discharge and Award of Attorney Fees (Instrument No. 65), Defendant Texas Savings and Loan Department's Motion for Summary Judgment (Instrument No. 62), Defendant Michael Casey's Motion for Summary Judgement (Instrument No. 64) and Defendant Office of Thrift Supervision's Motion for Summary Judgment (Instrument No. 66). After careful review of the facts and applicable law, the Court concludes that the motions filed by Defendant Texas Savings and Loan

Department and Defendant Office of Thrift Supervision will be **GRANTED.** Defendant Michael Casey's motion will be **DENIED.** The court further concludes that Plaintiff Robert Rhoades' Motion will be **GRANTED** in part and **DENIED** in part.

I. Background

Plaintiff Robert E. Rhoades ("Rhoades"), trustee for the FirstBanc Savings Association Employee Stock Ownership Plan ("ESOP"), filed this interpleader action under 28 U.S.C. § 1335, to resolve a dispute regarding the proper distribution of Defendant Michael Casey's ("Casey") alleged interest in the ESOP. This dispute arose from Casey's failure to comply with agreed administrative cease and desist orders, one issued by the Office of Thrift Supervision ("OTS") and one issued by the Texas Savings and Loan Department ("TSLD"), which contain provisions requiring Casey to waive any claim he may have to benefits under the ESOP.

Casey was, at one time, director, shareholder, President, and Chief Executive Officer of FirstBanc Savings Association of Texas ("FirstBanc"). His responsibilities included serving as trustee for the ESOP. In the fall of 1994, OTS. and TSLD conducted an investigation into Casey's management of the ESOP to determine whether Casey had committed regulatory violations, breached his fiduciary duties or otherwise improperly handled the ESOP funds. On June 21, 1993, a voluntary agreement was entered between Casey and the OTS, whereby Casey agreed to relinquish certain rights and abide by other restrictions in exchange for a commitment from OTS that

no further administrative action would be taken with respect to matters uncovered by the investigation. The relevant portions of the order issued by the OTS ("OTS Order") are as follows:

> CASEY shall forfeit, waive, and release any ESOP benefits, interests, distributions or claims for ESOP benefits, interests, and distributions ("ESOP Benefits"). CASEY shall not exercise any rights he otherwise may have to ESOP "Put Option" as described in paragraph 8.9 of the ESOP written plan. CASEY shall execute any and all waivers or documentation which may be requested or needed to waive the ESOP Benefits and/or the "Put Option". Additionally, CASEY shall not, directly, or indirectly, take any action which would require either the ESOP or FIRST-BANC to purchase any of CASEY'S rights or interest or member account in the ESOP.

(OTS's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment Pursuant to Rule 56, Instrument No. 67 at Ex. A). Furthermore, Casey agreed to the following:

> a. to comply with terms of the Order upon issuance and [ ] that the Order complies with all requirements of law;
>
> b. that the Order is a final Order, effective and fully enforceable by the OTS;
>
> c. [to] waive[ ] any right to seek judicial review of the Order . . . or otherwise [ ] challenge the validity of the Order.

(OTS's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment Pursuant to Rule 56, Instrument No. 67 at Ex. B).

Also on June 21, 1993, Casey and the TSLD entered into a similar agreement ("TSLD Order"). The applicable provisions of the TSLD Order are:

> CASEY shall hereby forfeit, waive and release any and all ESOP benefits, interests, distributions or claims for ESOP benefits, interest and distributions ("ESOP Benefits"). CASEY shall not exercise any rights he otherwise may have to the ESOP "Put Option" as described in paragraph 8.9 of the ESOP written plan. CASEY shall execute any and all waivers or documentation which may be required or needed to waive the ESOP Benefits and/or the "Put Option." Additionally, CASEY shall not, directly or indirectly, take any action which would require either the ESOP or FIRSTBANC to purchase any of CASEY's rights or interest or member account in the ESOP.

(Defendant Texas Savings and Loan Department's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, Instrument No. 63 at 3).

Casey contends that he signed the cease and desist orders in an effort to placate the agencies and to demonstrate cooperation and good faith, hoping that such a display would increase the likelihood that he would, after only a short delay, be permitted to again serve as an officer, director or employee of FirstBanc. This, however, never occurred. Casey now refuses to relinquish his ESOP benefits, claiming that the terms in the cease and desist orders requiring him to do so violate the anti-alienability provisions of Employee Retirement and Income Security Act ("ERISA") and are therefore void and unenforceable. *See* 29 U.S.C. § 1056 (d)(1). Casey also contends that

enforcement of these provisions may subject the ESOP to disqualification by the Department of Labor and/or the Internal Revenue Service and may possibly result in severe tax consequences for the ESOP's participants.

In contrast, Defendant TSLD claims that Casey's voluntarily waver of his right to benefits under the ESOP does not violate the anti-alienability provisions of ERISA and that Casey's untimely attack on the enforceability of the TSLD Order should be barred under the doctrine of res judicata. OTS argues that this Court lacks jurisdiction to determine the validity of its Order. In the alternative, OTS maintains that the anti-alienability provisions of ERISA do not prevent the assignment, as in this case, of benefits pursuant to a bona fide settlement of a controversy. In response, Casey argues that TSLD's authority to alienate Casey's ESOP benefits is preempted by ERISA, that a collateral attack of TSLD's void order is not precluded under the doctrine of res judicata and that his voluntarily relinquishment of rights does not alter or vary ERISA's mandatory prohibition against alienation.

Since the termination of the ESOP, Rhodes [sic] has been directed by the OTS and TSLD to comply with the terms of their Orders denying Casey his potential share of any ESOP payments. Rhodes [sic], a disinterested stakeholder with no claim to the funds, filed this interpleader action on November 1, 1995, to avoid exposure to multiple liability for any distributions made under the plan. Another action filed by the OTS was consolidated with this case on April 26, 1996. Motions for summary judgment were filed by all interested parties on February 18, 1997. In addition, Rhoades filed a Motion for Discharge and Award of Attorney's Fees, contending that he

is entitled to dismissal as he has fulfilled all the requirements of 28 U.S.C. §1335 and does not have an interest in or claim to the money deposited with this Court. Rhoades also contends that he should be reimbursed for the $23,955.21 of fees and expenses he has incurred in prosecuting this case.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson*, 106 S.Ct. at 2510. If the evidence rebutting the motion for summary judgment is only colorable or not significantly probative, summary judgment should be granted. *Anderson*, 106 S.Ct. at 2511; *see Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1088 (5th Cir. 1990), *cert. denied*, 112 S.Ct. 171 (1991). The summary judgment procedure, therefore, "enables a party 'who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of that [specific] fact before the lengthy process of litigation continues.' " *Microsoft Corp. v. CMOS Technologies, Inc.*, 872 F.Supp. 1329, 1334 (D.N.J. 1994) (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990)).

Under Fed. R. Civ. P. 56(c), the moving party bears the initial burden of informing the district court of the

basis for its belief that there is an absence of a genuine issue for trial, and for identifying those portions of the record that demonstrate such absence. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56 (1986); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987).

Where the moving party has met its Rule 56(c) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . [T]he nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' *Matsushita*, 475 U.S. at 586-87, 106 S.Ct. at 1356 (quoting Fed. R. Civ. P. 56(e)) (emphasis in original); *Celotex Corp. v. Carrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986); *Leonard*, 828 F.2d at 294. To sustain the burden, the nonmoving party must produce evidence admissible at trial. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2514; *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992) ("To avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue. . . . "). When, however, "the only question is what legal conclusions are to be drawn from an established set of facts, the entry of summary judgment usually should be directed." 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1983); *see also Florida Nursing Home Ass'n v. Page*, 616 F.2d 1355, 1362 (5th Cir. 1980) (stating that summary judgment is appropriate where the only remaining issues are issues of law).

III. OTS's Motion for Summary Judgment

OTS makes the following two arguments in support of its motion for summary judgment: (1) that this Court lacks subject matter jurisdiction over this action which contests the validity of the OTS Order and (2) that Casey's voluntary waiver of his interest in the ESOP does not violate ERISA's anti-alienability provision.

Section 1818 (b) of the Federal Deposit Insurance Act ("FIDA") confers upon the OTS the power to initiate administrative proceedings, culminating in cease and desist orders, to prevent any insured depository institution from engaging in unsafe or unsound practices or otherwise violating a law, rule, regulation or other agency imposed condition of operation. *See* 12 U.S.C. § 1818(b)(1); *see also Cityfed Financial v. Office of Thrift Supervision*, 58 F.3d 738, 741 (D.C. Cir. 1995). FIDA also establishes a comprehensive scheme of judicial review of actions taken pursuant to these provisions. This severely restricts the jurisdiction of courts to review ongoing administrative proceedings brought by banking agencies. *See Board of Governors v. Mcorp Financial*, 112 S.Ct. 459, 463 (1991); *Cityfed Financial*, 58 F.3d at 741. For instance, only the courts of appeals have authority under FIDA to review final agency orders or notices. 12 U.S.C. § 1818(h). District courts are limited to the enforcement of these notices and to the review of temporary, but not final, orders issued pending the completion of administrative proceedings. 12 U.S.C. § 1818(h). However, none of these provisions are applicable in the instant action. Instead, FIDA'S preclusion provision, § 1818(i)(1), controls:

> "[E]xcept as otherwise provided in this section . . . no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. § 1818(i)(1).

Casey argues, notwithstanding the clear, prohibitive language of § 1818(i)(1), that this Court has jurisdiction to modify the terms of the consent agreement if violative of ERISA's anti-alienation provision. The Court, however, disagrees. In *Board of Governors v. Mcorp Financial*, the United States Supreme Court addressed the question of whether judicial review of agency action was permitted, despite the preclusive effect of § 1818(i)(1), when the disputed action allegedly exceeds that agency's statutory authority. *Board of Governors v. Mcorp Financial*, 112 S.Ct. 459, 465-66 (1991). Due to "the clarity of the congressional preclusion of review," the Court declined to create any exception to the scheme of judicial review established under § 1818 that would otherwise defeat Congress's clear intent to deny district courts the jurisdiction to review final agency orders. *Id.* at 466.

In determining the scope of its authority in any given case, a court must be careful to "neither evade nor disregard limitations on its subject matter jurisdiction." *Henry v. Office of Thrift Supervision*, 835 F.Supp. 583, 585 (D. Kan. 1993). Indeed, a court must "scrupulously confine [its] own jurisdiction to the precise limits which [a federal] statute has defined." *Victory Carriers, Inc. v. Law*, 92 S.Ct. 418, 425 (1971). The relief sought by Casey in the instant case unquestionably falls within the scope of

§ 1818(i)(1)'s preclusionary language. Therefore, the Court does not have the jurisdiction to determine the validity of the OTS order. *See First National Bank of Chicago v. Steinbrink*, 812 F.Supp. 849, 855 (N.S. Ill. 1993) ("[T]his Court cannot exercise jurisdiction where the clear result of granting the relief sought . . . would be to affect otherwise the issuance or enforcement of any administrative order and to 'circumvent[ ] the administrative machinery put in place by § 1818 to permit the appropriate regulatory agency . . . to proceed with enforcement actions.' ") (quoting *Resolution Trust Corp v. Ryan*, 801 F.Supp. 1545, 1550 (S.D. Miss. 1992)).

Moreover, the Court finds that even if jurisdiction were proper, Casey still cannot prove that the OTS Order is unenforceable as violative of ERISA's anti-alienability provision. This provision does not prevent a plan participant from knowingly and voluntarily waiving or releasing his right to benefits. *See Finz v. Schlesinger*, 957 F.2d 78, 82 (2d. Cir. 1992) (holding that knowing and voluntary waiver of pension claim in exchange for substantial consideration was valid); *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 455 (7th Cir. 1991) (holding that ERISA's anti-alienation provision protects individuals from pledging their benefits as collateral or squandering them before retirement and that the provision, "while clearly manifesting Congress' intent to protect workers from unknowingly signing away their vested pension benefits, does not impose a bar on settlement agreements wherein pension claims are knowingly and intentionally resolved by employees"); *Commercial Mortgage Ins. Inc. v. Citizens Nat'l Bank*, 526 F.Supp. 510 (N.S. Tex. 1981) (holding that the only reasonable reading of ERISA's anti-

assignment provisions and the totality of the legislative history is that these provisions extend to involuntary assignments such as garnishments); STEPHEN R. BRUCE, PENSION CLAIMS RIGHTS AND OBLIGATIONS 720 (2d ed. 1993) (stating that although ERISA contains an anti-assignment or alienation provision for pension benefits, courts have generally allowed waivers or release of rights in the appropriate circumstances); *see also Stobnicki v. Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989) (holding that the anti-assignment provisions of ERISA do not preclude a pension plan beneficiary from assigning his benefits as a part of a settlement of a dispute between adverse claimants to benefits). OTS's motion for summary judgment will therefore be granted.

IV. TSLD's Motion for Summary Judgment

TSLD contends that summary judgment in its favor is appropriate because Casey is barred under the doctrine of res judicata from contesting the validity of the TSLD Order. TSLD further contends that even if the Court were to consider the merits of Casey's claim, Casey's voluntary waiver of his ESOP benefits do not violate ERISA's anti-alienability provision. In response, Casey argues that TSLD is without authority to issue an order, such as the instant order, which violates ERISA's explicit prohibition against assignment or alienation of an ERISA covered plan's benefits. Casey therefore claims that the TSLD Order is void and unenforceable. In the alternative, Casey argues that if TSLD was authorized under state statute to issue an order divesting Casey of all his interests in the ESOP, such statute is clearly preempted by ERISA.

Under the Texas Savings and Loan Act, TSLD has the authority to regulate state-chartered savings associations and to issue supervisory orders if the association or any person participating in the affairs of such association engage in conduct deemed to be an unsafe and unsound operating practice. TEX. REV. CIV. STAT. ANN. art. 852 §§ 8.04, 8.05 (Vernon 1996). The TSLD Order was issued pursuant sections 8.04 and 8.05 of this Act. A rehearing of this decision was not requested nor was a petition for judicial review filed.

Subject only to few exceptions, ERISA's broad pre-emption clause provides that ERISA shall "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . . " 29 U.S.C. § 1144(a); *see also Howard v. Parisian, Inc.*, 807 F.2d 1560, 1563 (11th Cir. 1987) ("ERISA preempts all state laws insofar as they apply to employee benefit plans even if those laws do not expressly concern employee benefit plans and amount only to indirect regulation of such plans."). "In order for preemption to be found, there must be a state law, an employee benefit plan and the state law must 'relate to' the employee benefit plan." *Anderson v. Marshall*, 856 F.Supp. 604, 605 (D. Kan. 1994). For purposes of section 1144(a), "state law" includes "all laws, decisions, rules, regulations or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). Further, a state law will be found to relate to an employee benefit plan "if it has connection with or reference to such a plan." *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, 1557 (10th Cir. 1992).

State laws regulating banking, however, are not, by means of a "savings clause", subject to preemption. This

clause states that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities." 29 U.S.C. § 1144(b)(2)(A). The scope of this exemption is limited by another clause, the "deemer clause" which provides:

> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

29 U.S.C. § 1144(b)(2)(B). The deemer provision, however, does not prohibit a state, in its regulation of the insurance, banking or securities industry, from indirectly affecting the content and operation of an ERISA covered plan. *See FMC Corp. v. Holliday*, 111 S.Ct. 403, 411 (1990) (holding that under the deemer clause a state may regulate an employee benefits plan indirectly through the regulation of its insurer and its insurer's contracts); *Gonzales v. Prudential Ins. Co. of America*, 901 F.2d 446, 453 (5th Cir. 1990) ("Nothing in the deemer clause prohibits the application of state insurance laws to an insurer of an ERISA plan. . . . Thus, by regulating the insurer . . . the state may, without running afoul of the deemer clause, indirectly influence the content and operation of an insured ERISA plan.").

The Court finds that TSLD Order, as regulatory action taken by the state to affect banking, falls within the ambit of the savings clause but not within prohibitions of

the deemer clause. TSLD has not categorized the ESOP as a bank in order to regulate the plan, its contents or its management. Nor has it attempted to regulate the ESOP as a pension plan. In *Old Stone Bank v. Michaelson,* the court, faced with a similar preemption issue, held that a decision of a state agency responsible for state chartered banks is not preempted when such decision related to the regulation of the bank in its corporate capacity rather than the regulation of an ERISA covered plan. *Old Stone Bank v. Michaelson,* 439 F.Supp. 252, 256 (D. R.I. 1977).

Likewise, in this case, TSLD, in the exercise of its legitimate statutory authority, is seeking to regulate First-Banc, a state chartered savings association subject to the provisions of the Texas Savings and Loan Act, in its corporate capacity and in its capacity as trustee of the ESOP. TSLD is not attempting to regulate the ESOP itself. Therefore, the Court concludes that action taken by TSLD pursuant to the Texas Savings and Loan Act is not preempted by ERISA and that the TSLD Order is valid and enforceable. *See Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters, Inc.,* 793 F.2d 1456 (5th Cir. 1986) (state law not preempted when the law centered around the relationship between a corporate officer and the corporation's shareholders and the duties imposed upon the corporate officer by such law arose solely from his status in the corporation; the fact that the corporate officer had obligations under ERISA had no bearing on the obligations sought to be enforced under state law.) Moreover, Casey is barred from collaterally attacking the validity of the order under the doctrine of res judicata. *See Montgomery v. Blue Cross & Blue Shield,* 923 S.W.2d 147, 150 (Tex. App. – Austin 1996, writ denied)

(holding that res judicata is applicable to the relitigation of claims previously determined by an administrative agency); *Coalition of Cities for Affordable Utility Rates v. Public Utility Commission of Texas*, 798 S.W.2d 560, 565 (Tex. 1990) (stating that to permit relitigation of an agency decision would offend the policy reasons supporting the doctrine of res judicata). TSLD's motion for summary judgment will therefore be granted.

V. Casey's Motion for Summary Judgment

Casey argues in his motion for summary judgment that both the OTS and the TSLD Orders are void and unenforceable because ERISA expressly prohibits the assignment, alienation or forfeiture of pension benefits. In light of the Court's ruling on OTS's and TSLD's motions for summary judgment, however, Casey's motion will be denied.

VI. Rhoades' Motion for Discharge and Award of Attorney's Fees

Rhoades has requested that the Court discharge him from this proceeding. Rhoades claims that because he has no interest in the funds deposited with the Court, his presence in this suit is no longer necessary. Rhoades, will not be discharged, however, until a final distribution of the funds are made.

As to Rhoades' request for attorney's fees, the Court may, within its discretion, award such fees to the stakeholder in an interpleader action. *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 696 F.2d 359, 364 (5th Cir. 1983).

Attorney's fees are not awarded in interpleader actions as a matter of course. *Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61 (5th Cir. 1976) (attorney's fees in interpleader action not awarded as a matter of course) Generally, they are available only when the party initiating the proceeding is acting as a mere stakeholder and has not claimed an interest in the fund or otherwise become a part of the controversy. *See Perkins State Bank v. Connolly*, 632 F.2d 1306, 1311 (5th Cir. 1980) (plaintiff who "enters into the conflict (by contesting the ownership of the fund or by disputing the correct amount of his liability) will not, in the absence of special circumstances, be awarded any expenses"); *Companion Life Ins. Co. v. Schaffer*, 442 F.Supp. 826 (D.C. N.Y. 1977) (fees appropriately awarded to "an innocent and otherwise disinterested stakeholder who has been required to expend time and money to participate in a dispute not of his own making and the outcome of which has no impact upon him.") "The test for awarding fees and costs is a typical equitable one that is very similar to the standard used to determine whether interpleader relief ought to be granted – should the interpleading party be required to assume the risk of multiplicity of actions and erroneous election." 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1719 (2d ed. 1983). The test is not satisfied, however, if the stakeholder has contributed to the need for interpleader by acting in bad faith, by unduly delaying in seeking relief, by seeking interpleader prematurely or by lacking a sufficient basis for believing that he will be subjected to multiple vexation.

Id. The Court finds that Rhoades, as a disinterested stakeholder, is entitled to an award of attorney fees in the amount of $23,955.21.

VII. Conclusion

Accordingly, it is **ORDERED** that Defendant OTS's and Defendant TSLD's motions for summary judgment will be **GRANTED**. It is further ordered that Casey's motion for summary judgment is **DENIED**. Rhoades' motion for award of attorney fees will also be **GRANTED**. It is **FURTHER ORDERED** that Rhoades' motion for discharge is **GRANTED** and Rhoades will be discharged from further liability in this action pursuant to 28 U.S.C. § 2361 when the final judgment is signed in this case. Rhoades, TSLD and OTS are **ORDERED** to submit an agreed "Financial Order", in the form attached hereto designating how all funds currently held in the registry of the Court should be distributed. A final judgment will be entered when the signed Financial Order is filed with the Court. All relief not specifically granted herein is denied.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED this 23rd day of April, 1997

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20819

ROBERT E RHOADES, Trustee for
the Firstbanc Savings Association Employee
Stock Ownership Plan

Plaintiff-Appellee

v.

MICHAEL E CASEY; ET AL

Defendants

MICHAEL E CASEY

Defendant-Counter
Claimant-Appellant

v.

THE TEXAS SAVINGS AND LOAN
DEPARTMENT; KATHY BARNES;
VIVIAN WECHIE

Defendants-Appellees

and

THE OFFICE OF THRIFT SUPERVISION
Defendant-Counter
Defendant-Appellee

****

DIRECTOR OF THE OFFICE OF THRIFT
SUPERVISION, U S DEPARTMENT OF
THE TREASURY

Plaintiff-Appellee

v.

MICHAEL E CASEY

Defendant-Appellant

Appeals from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Opinion 12/3/99, 5 Cir., ___, ___ F.3d ___)

(Filed Feb. 7, 2000)

Before KING, Chief Judge, SMITH, and STEWART, Circuit Judges.

PER CURIAM:

[X] Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

[ ] Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

REHG-6a

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

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CLERK OF THE COURT

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479-3011

May 1, 2000

Mr. Walter Arnold Carr
515 Spencer Highway
South Houston, TX 77587

Re: Michael E. Casey
v. Robert E. Rhoades, et al.
Application No. 99A890

Dear Mr. Carr:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on May 1, 2000, extended the time to and including June 7, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Melissa A. Blalock
Melissa A. Blalock
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
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WASHINGTON, DC 20543-0001

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FILED
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(2)

No. 99-1975

In The

Supreme Court of the United States

MICHAEL E. CASEY,

Petitioner,

v.

ROBERT E. RHOADES, AS TRUSTEE FOR THE FIRSTBANC SAVINGS ASSOCIATION EMPLOYEE STOCK OWNERSHIP PLAN, ALL OTHER PARTICIPANTS IN THE FIRSTBANC EMPLOYEE STOCK OWNERSHIP PLAN; THE OFFICE OF THRIFT SUPERVISION and THE TEXAS SAVINGS AND LOAN DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT ROBERT E. RHOADES' BRIEF IN OPPOSITION

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1499

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TO THE SUPREME COURT OF THE UNITED STATES:

This brief is filed on behalf of Respondent, Robert E. Rhoades, as trustee for the FirstBanc Savings Association Employee Stock Ownership Plan ("ESOP").

STATEMENT OF THE ISSUE OPPOSED

The district court did not commit plain error in awarding Respondent's attorneys' fees and expenses for bringing this interpleader action.

OPINIONS BELOW

This response is timely filed pursuant to an extension of the time for filing until August 9, 2000. This response is intended to address only the fifth error Michael Casey ("Casey") asserts in his Petition; namely, that an award of attorneys' fees in the district court to the Plaintiff-in-Interpleader was outside the discretion of the district court. This brief will also address Casey's assertions or implications that the Trustee Robert Rhoades ("Trustee" or "Rhoades") did not act in good faith or violated his fiduciary duties by filing this interpleader. Respondent expects that the Office of Thrift Supervision ("OTS") and/or the Texas Savings and Loan Department ("TSLD") are filing briefs addressing the first four points asserted by Casey, which concern the substantive application of the Employee Retirement and Income Security Act ("ERISA").

REASONS FOR DENYING THE WRIT

Respondent asserts that this Court should deny the Petition, particularly in relation to Petitioner's complaint about the district court's award of attorneys' fees and expenses. Petitioner merely complains that the district court abused its discretion, even though that decision is wholly left to the trial court's discretion, a fact the Fifth Circuit clearly recognized. The trial court did not commit plain error (the correct standard) by its award of attorneys' fees and expenses.

SUMMARY OF THE ARGUMENT

First, Casey has waived any argument contesting the award of attorneys' fees or the propriety of the interpleader action itself. To allow Casey to now assert as error a matter to which he never objected, despite many opportunities, at trial, is inequitable and counter to the letter and intent of both the Federal Rules of Civil Procedure and relevant case law.

Second, interpleader was proper in this case. The stakeholder (i.e., Robert Rhoades, the Trustee) simply deposited a limited fund that could have been subject to multiple claims and would have subjected the Trustee to potential multiple claims of liability. Interpleader is proper even if threats of multiple vexation to the claim may be prospective in nature. Further, Casey's own motion for summary judgment recognizes the propriety of the interpleader action, and other potential claimants filed claims to the disputed stake.

Finally, the district court did not commit plain error in awarding attorneys' fees to Rhoades. Rhoades' only objective in this litigation, as clearly established by his pleadings and other actions, was shielding the limited fund from exposure to multiple liabilities. Additionally, evidence in the record supports the award of attorneys' fees. Federal jurisprudence is well settled: an award of attorneys' fees is proper in this case.

ARGUMENT

I. A Litigant May Not Assert As Error On Appeal An Issue Never Contested At Trial.

Casey's brief to this Court raises two arguments that Casey did not raise in the district court. For the first time on appeal, Casey alleges that the Trustee acted improperly in bringing this interpleader action. Also for the first time, Casey challenges the district court's award of attorneys' fees to Rhoades. Arguments not raised in the district court are waived on appeal. *See, e.g., Garcia v. Excel Corp.*, 102 F.3d 758, 759 (5th Cir. 1997) ("[W]e will not consider on appeal matters not first considered by the trial court."); *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 822 (5th Cir. 1996) ("This Court will not address an argument raised by a party for the first time on appeal."); *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 173 (5th Cir. 1996) ("[W]e do not consider on appeal a claim not presented to the district court."). Therefore, Casey has waived these arguments.

Rhoades' original petition makes clear the conflicting claims to the disputed funds, thereby necessitating this

interpleader, and Rhoades' intent to seek a fee award. Further, Rhoades designated as experts his attorneys to testify on the subject of attorneys' fees, making it clear that Rhoades intended to pursue his attorneys' fees as Plaintiff-in-Interpleader.

Casey did not object to Rhoades' filing of this interpleader action, the qualifications of Rhoades' experts on the subject of attorneys' fees, or the awarding or the amount of the award of attorneys' fees to Rhoades in (1) his motion to dismiss pursuant to Rule 12(b)(6); (2) his designation of experts; (3) his motion for summary judgment; (4) perhaps most importantly, his response to Rhoades' motion for discharge; and, (5) his motion for a new trial. To allow Casey to assert on appeal error which was not contested at trial offends equitable principles and is contrary to the broad pleading rules established by the Federal Rules of Civil Procedure.

Alternatively, the Fifth Circuit correctly applies the "plain error" standard since Respondent first challenged the award on appeal. *See* Appendix to Petition at 22. Respondent failed to meet this standard because the award does not implicate the substantial rights of the parties and does not seriously affect the fairness, integrity or public reputation of judicial proceedings. *See Rizzo v. Children's World Learning Centers, Inc.*, 173 F.3d 254 (5th Cir. 1999); *Crawford v. Falcon Drilling Co.*, 131 F.3d 1120, 1124 (5th Cir. 1997); *Russell v. Plano Bank & Trust*, 130 F.3d 715 (5th Cir. 1997).

II. This Interpleader Is Proper.

The Trustee did not violate his contractual or statutory duties owed to Casey or any other plan members by properly filing this interpleader action. The amount in controversy consists of the shares, benefits, or interest in the FirstBanc Savings Association ESOP potentially belonging to Casey, the former FirstBanc President and Managing Officer.

The Trustee filed this interpleader action only after it became apparent that the disposition of these funds was subject to conflicting orders from the OTS, the TSLD, the Internal Revenue Service ("IRS"), and Michael Casey. All of the other participants in the ESOP were also made defendants in this lawsuit since they have vested interests in the ESOP, meaning that they may have interests in that portion of the ESOP fund to which Casey makes claims and that were addressed in the OTS order and the TSLD order.

While Casey made a claim to the disputed funds, the OTS and the TSLD directed Rhoades to comply with the terms of their respective orders regarding Casey. However, if Rhoades had complied, he would have risked liability under the anti-alienability provisions of ERISA, (*e.g.*, 29 U.S.C. § 1056(d) (1994)) and the Internal Revenue Code § 407(a)(13)(A) (1994). Rhoades could also have been exposed to sanctions for discrimination against an ESOP participant under 29 U.S.C. §§ 1140, 1141 (1994).

Under 28 U.S.C. § 1335 (1994) and Federal Rule of Civil Procedure 22, this interpleader action is proper

because two or more adverse claimants of diverse citizenship claimed entitlement to a disputed portion of the ESOP funds. Rhoades was or could have been exposed to double or multiple liability concerning payment of Casey's purported share of the ESOP funds. Rhoades had reasonable grounds to anticipate rival claims for the ESOP funds. *See James P. Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 468 (5th Cir. 1971). Interpleader is proper even when the threats of multiple vexation to the funds are prospective, because the current interpleader provision authorizes interpleader with two or more persons who claim or may claim interests in the disputed funds. *See* 28 U.S.C. § 1335(a)(1) (1994); *Country Club Dairy Co. v. Peoples Bank*, 169 F. Supp. 699, 701 (W.D. Mo. 1959).

Finally, Casey's own Motion for Summary Judgment recognizes the propriety of this interpleader action. Casey states in his Summary Judgment Motion as follows:

> Robert Rhoades, the ESOP trustee, and his lawyers properly recognized that the purported waiver of benefits in the Cease and Desist Order between Casey and the government likely violated ERISA's prohibition of alienation of pension benefits. [footnote omitted] Rhoades brought this action in response. With this Court's permission, Mr. Rhoades interpled the amount of $77,064.04, representing Mr. Casey's share of the ESOP benefits.

III. The District Court Did Not Commit Plain Error in Awarding Attorneys' Fees to the Trustee.

A district court possesses the discretion to award costs and attorneys' fees in interpleader actions. *See Corrigan Dispatch Co. v. Casa Guzman*, 696 F.2d 359, 364 (5th Cir. 1983); *see also Perkins State Bank v. Connolly*, 632 F.2d 1306, 1311 (5th Cir. 1980) (holding that there is a federal interest in protecting the stakeholder in his pursuit of attorneys' fees in an interpleader action and that costs and attorneys' fees are generally awarded by federal courts to the plaintiff who initiates the interpleader as a mere stakeholder); *Gulf Oil Corp. v. Olivier*, 412 F.2d 938, 946 (5th Cir. 1969) (concluding that costs and attorneys' fees are ordinarily awarded to the disinterested stakeholder in an interpleader proceeding and that the matter is ultimately vested within the sound discretion of the trial judge). This proposition is "well settled" under federal law. *See Id.* The Fifth Circuit court correctly held that the trial court's award of attorneys' fees was not plain error. *See* App. at 22-23; *Crawford*, 131 F.3d at 1124; *Nickel v. Estes*, 122 F.3d 294, 301 (5th Cir. 1997). Respondent has presented no argument to this Court that the trial court committed plain error.

Casey asserts that Rhoades was not a disinterested stakeholder. Rhoades' pleadings and other actions in the case clearly establish that Rhoades' only concern was preventing the fund from being subject to multiple liabilities, and that Rhoades did not take a position as to the validity of Casey's claim at any time during these proceedings. For example, in Plaintiff's Motion for Discharge of Plaintiff and Award of Attorneys' Fees, the Trustee

alleged the factual circumstances of the OTS and TSLD ordering Casey to forfeit his rights to the disputed ESOP funds, and Casey and the other ESOP participants claiming the rights to the disputed funds regardless of the orders. Plaintiff's Motion goes on to state that Plaintiff filed the interpleader action in good faith and has taken no action that favors or furthers any of the Defendants' rights to the funds.

Moreover, evidence in the record supports the award of attorneys' fees. Rhoades designated the following as experts in his filing of June 21, 1996: Robert B. Neblett III, Brandon C. Janes and Jeffrey T. Knebel on behalf of the firm of Small, Craig & Werkenthin. The witnesses were designated as licensed attorneys and it was made clear that the witnesses might offer their testimony and opinions regarding the reasonableness and necessity of attorneys' fees incurred in this matter.

In Plaintiff's Motion for Discharge of Plaintiff and Award of Attorneys' Fees filed February 18, 1997, counsel for the Plaintiff, Jeffrey T. Knebel, submitted an affidavit regarding the type and scope of services performed by attorneys in representing Plaintiff Rhoades, which included significant amounts of legal preparation over the course of a year and a half for this litigation. No parties objected to Plaintiff's Motion for Discharge or any of the evidence submitted therewith, including the type and scope of services and the requested amount of the attorneys' fees awarded. Exhibit "A" to that affidavit contained a detailed, itemized billing record for this matter. In determining an award of attorneys' fees in an interpleader action, it is proper for the court to determine the fee from the evidence of the Plaintiff in the form of an

affidavit and statements by his attorney as to the services rendered. *Lincoln Income Life Insurance Co. v. Harrison*, 71 F.R.D. 27 (W.D. Okla. 1976).

This was a complicated case involving the application of a complex, specialized statute and a collateral criminal investigation. Numerous settlement and other discussions required the time of Rhoades' counsel and their efforts to facilitate any settlement reached among the OTS, TSLD, Casey, and other ESOP participants. The district court was well aware of the time Rhoades' counsel was devoting to the case and the reasons for those time demands, as evidenced by the numerous pleadings Rhoades' counsel filed with the Court, discovery responses Rhoades filed with the Court, and discussions at two separate hearings in Houston before the Court, including progress talks on settlement discussions between the parties. The district court took those factors into account in determining the reasonableness of its attorneys' fees award, and exercised sound discretion in doing so.

CONCLUSION

Casey never objected in any way to the propriety of this interpleader action or of Rhoades' attorneys' fees at the trial level. Any arguments he forwards to this Court should, therefore, be viewed as untimely and waived. Alternatively, the district court did not commit plain error in awarding Rhoades his attorneys' fees and should be affirmed.

Robert Rhoades acted appropriately in bringing this interpleader action. There is a federal interest in protecting the stakeholder in such an action in order to encourage the use of interpleader in appropriate disputes. Federal courts uniformly recognize that federal interest and widely hold that an award of attorneys' fees to a Plaintiff-In-Interpleader is proper in a case such as this one.

Therefore, Respondent requests that this Court deny the Petition for Writ of Certiorari regarding the trial court's award of attorneys' fees and expenses to Respondent.

Respectfully submitted,

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No. 99-1975

In the Supreme Court of the United States

MICHAEL E. CASEY, PETITIONER

v.

ROBERT E. RHOADES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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16pp

QUESTIONS PRESENTED

1. Whether 29 U.S.C. 1056(d)(1), the anti-alienation provision of the Employee Retirement Income Security Act of 1974 (ERISA), barred the Office of Thrift Supervision from issuing a cease-and-desist order that required petitioner to forfeit ERISA pension plan benefits.

2. Whether the district court was barred by 12 U.S.C. 1818(i)(1) from adjudicating the validity of the cease-and-desist order issued by the Office of Thrift Supervision.

3. Whether ERISA preempts the state banking statutes under which the Texas Savings and Loan Department issued a similar cease-and-desist order.

4. Whether the cease-and-desist order issued by the Texas Savings and Loan Department is entitled to res judicata effect under state law.

5. Whether the district court abused its discretion in awarding attorneys' fees to the trustee of the ERISA pension plan in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 196 F.3d 592. The opinion of the district court (Pet. App. 24-40) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1999. A petition for rehearing was denied on February 7, 2000 (Pet. App. 41-42). On May 1, 2000, Justice Scalia extended the time to file a petition for a writ of certiorari to and including June 7, 2000. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the president and chief executive officer of FirstBanc Savings Association of Texas (FirstBanc) as well as a director and shareholder of FirstBanc. He was also the sole trustee of the First-Banc Employee Stock Ownership Plan (ESOP) and a participant in the ESOP. Pet. App. 2.

Shortly after the formation of the ESOP in 1987, the Office of Thrift Supervision (OTS), the federal regulator of FirstBanc, became concerned about the administration of the ESOP. In 1991, OTS commenced a formal examination of FirstBanc and the ESOP to determine whether petitioner had violated banking regulations and breached his fiduciary duty in his administration of the ESOP. Pet. App. 2-3.

In 1993, in order to avoid the initiation of administrative proceedings against him, petitioner entered into a Stipulation and Consent to Issuance of Order to Cease and Desist (Stipulation) with OTS. The Stipulation recited that OTS believed that grounds existed to initiate administrative cease-and-desist proceedings against petitioner because petitioner's "actions and inactions concerning the creation, funding, and operation of the [ESOP] were a breach of his fiduciary duties to FirstBanc, involved unsafe and unsound practices," and violated applicable regulations. Petitioner, without admitting or denying that grounds existed to initiate administrative proceedings, consented to the issuance of a Final Order to Cease and Desist (Final Order). He stipulated that the Final Order was effective and enforceable, agreed to comply with the Final Order, and waived his right to seek judicial review of the Final Order or otherwise to challenge its validity. Pet. App. 34; OTS C.A. Br. 4-5.

The Final Order removed petitioner as a director of FirstBanc and as the trustee of the ESOP. The Final Order further provided, *inter alia*, that petitioner "shall forfeit, waive, and release any ESOP benefits, interests, distribution or claim for ESOP benefits, interests, and distributions." Pet. App. 3.[1]

Petitioner simultaneously entered into a similar stipulation and order with the Texas Savings and Loan Department (TSLD). Pet. App. 3, 26.

2. When OTS directed petitioner to forfeit his ESOP benefits, as required by the Final Order, he refused to do so. He also refused to comply with TSLD's companion order. Pet. App. 4.

Faced with competing claims to petitioner's ESOP benefits, Robert E. Rhoades, the new trustee for the ESOP, filed an interpleader action and deposited the $77,064.04 in dispute with the district court registry. OTS, in turn, filed an action seeking to enforce the terms of the Final Order. The two actions were consolidated. OTS, TSLD, and petitioner all filed motions for summary judgment. The ESOP trustee filed a motion for discharge and payment of his attorneys' fees. Pet. App. 4-5.

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[1] In conjunction with the entry of the Final Order, OTS notified the Department of Labor's Pension and Welfare Benefits Administration (PWBA) of its concerns regarding the administration of the ESOP. PWBA, after conducting its own investigation, found that petitioner had committed multiple violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and the ESOP governing documents. In particular, PWBA found that petitioner had breached his fiduciary duties by allowing the ESOP to purchase FirstBanc stock at a price greater than its fair market value. OTS C.A. Br. 2-3.

3. The district court granted OTS's and TSLD's motions for summary judgment and denied petitioner's motion. Pet. App. 24-40.

The district court held that it had jurisdiction only to enforce the Final Order, not to adjudicate its validity. The court relied on 12 U.S.C. 1818(i)(1), which confers jurisdiction on district courts to "order and require compliance" with cease-and-desist orders of federal banking agencies, but which provides that "no court shall have jurisdiction * * * to review, modify, suspend, terminate, or set aside any such * * * order," except as otherwise provided. Pet. App. 31-32.

The district court also observed that, even if it had jurisdiction to review or rescind the Final Order, petitioner's challenge to the Final Order would fail. The court concluded that the Final Order did not, as petitioner claimed, violate the anti-alienation provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1056(d)(1), which states, in relevant part, that benefits provided under an ERISA pension plan may not be "assigned or alienated." The court reasoned that Section 1056(d)(1) "does not prevent a plan participant from knowingly and voluntarily waiving or releasing his right to benefits." Pet. App. 33.

The district court also rejected petitioner's challenges to the order issued by TSLD. The court held that the order, as an exercise of TSLD's statutory authority to regulate state-chartered banks, falls within ERISA's savings clause, 29 U.S.C. 1144(b)(2)(A), which provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates * * * banking." Pet. App. 35-36. The court alternatively held that petitioner was

barred by res judicata from challenging the TSLD order. *Id.* at 37-38.

The district court granted the ESOP trustee's motion for payment of $23,955.21 in attorneys' fees and ordered that the remaining $53,108.83, plus interest, be paid to the other ESOP participants. Pet. App. 5, 38-40.

4. The court of appeals affirmed. Pet. App. 1-23.

The court of appeals held, "based on the plain and preclusive language of § 1818(i)(1)," that the district court did not have jurisdiction in OTS's enforcement action to modify or terminate the Final Order. Pet. App. 9. But the court of appeals held that the district court, as part of its "effort to fashion a solution to the interpleader action," could consider petitioner's claim that the Final Order violated ERISA's anti-alienation provision. *Id.* at 11.

The court of appeals then concluded that the anti-alienation provision did not apply to the Final Order. The court noted that petitioner "knowingly and voluntarily entered into a settlement agreement with OTS in which he agreed to waive his retirement benefits" as part of "a bargained for exchange" in which "OTS agreed not to pursue formal administrative litigation against [petitioner], which could have resulted in [his] being ordered to pay civil penalties." Pet. App. 13-14.

The court of appeals next held that the companion TSLD order was enforceable against petitioner. The court concluded, as a matter of Texas law, that petitioner's challenge to the TSLD order was barred by res judicata. Pet. App. 19-21. The court therefore found it unnecessary to decide whether ERISA preempted the state statutes under which TSLD issued the order. *Id.* at 21.

Finally, the court of appeals upheld the award of attorneys' fees to the ESOP trustee. Pet. App. 22-23.

The court reviewed the attorneys' fee award only for plain error, noting that petitioner "admit[ted] that he failed to timely challenge" the award. *Id.* at 22.

ARGUMENT

The court of appeals correctly upheld OTS's Final Order requiring petitioner to forfeit his ESOP plan benefits. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Nor does this case present any other federal question of general significance. Further review therefore is not warranted.

1. a. Petitioner contends (Pet. 11-16) that the court of appeals erred in rejecting his claim that the Final Order, in requiring the forfeiture of his ESOP benefits, violates ERISA's provision that pension plan benefits may not be "assigned or alienated," 29 U.S.C. 1056(d)(1). But no such claim could properly have been adjudicated in this case. The district court and the court of appeals had no jurisdiction to review the Final Order for compliance with the provisions of ERISA or any other federal statute.

OTS and other banking regulatory agencies have broad statutory authority to remedy conditions resulting from unsound banking practices and violations of banking laws, including the authority to issue cease-and-desist orders requiring a financial institution or affiliated persons to "make restitution or provide reimbursement," to "dispose of any loan or asset involved," to "rescind agreements or contracts," and to "take such other action as the banking agency determines to be appropriate." 12 U.S.C. 1818(b)(6); see also 12 U.S.C. 1463(a). As the court of appeals recognized (Pet. App. 9-11), in an action by a federal banking agency to enforce its cease-and-desist order, such as the OTS

Final Order in this case, a district court does not have jurisdiction to review the validity of the order. See 12 U.S.C. 1818(i)(1) (providing, with certain exceptions not applicable here, that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of" such cease-and-desist orders "or to review, modify, suspend, terminate, or set aside" such orders). The validity of such orders may be challenged only in the court of appeals on a petition filed within 30 days of the issuance of the order. See 12 U.S.C. 1818(h)(2).

The court of appeals nonetheless concluded (Pet. App. 11-12) that, because OTS's action to enforce the Final Order had been consolidated with the ESOP trustee's interpleader action, the district court could consider the validity of the Final Order. That conclusion is incorrect. It is inconsistent with the statutory scheme for judicial review of federal banking agencies' cease-and-desist orders provided in Sections 1818(i)(1) and 1818(h)(2) and with the underlying congressional intent that all challenges to the validity of such orders be resolved in the courts of appeals expeditiously upon the issuance of the order. See generally *Board of Governors of the Federal Reserve System* v. *MCorp Financial, Inc.*, 502 U.S. 32, 42 (1991) (holding that "the specific preclusive language in 12 U.S.C. § 1818(i)(1) (1988 ed., Supp. II) is not qualified or superseded by the general provisions" of other jurisdictional grants).

By contrast, the court of appeals allowed petitioner to challenge, albeit unsuccessfully, the validity of the Final Order for the first time in district court more than two years after its issuance, and notwithstanding his earlier voluntary agreement not to seek judicial review of the Order or otherwise to challenge its validity (see Pet. App. 34). But, as the district court recognized (*id.*

at 31-33) although the court of appeals did not (*id.* at 11-12), those courts, for the reasons that we have explained, did not have jurisdiction to reach the merits of petitioner's claim based on ERISA's anti-alienation provision. Nor, therefore, could that claim properly be reached by this Court in this case.[2]

b. In any event, contrary to petitioner's assertions (Pet. 11-16), the court of appeals' holding on the merits of petitioner's challenge to the Final Order based on ERISA's anti-alienation provision does not conflict with *Boggs* v. *Boggs*, 520 U.S. 833 (1997). The circumstances of this case are entirely unlike those in *Boggs*.

In *Boggs*, the Court was concerned with whether ERISA preempted a state community property law that allowed the wife of a pension plan participant to transfer by will her interest in the participant's undistributed benefits. The wife had died before her husband retired, leaving her interest in those benefits to her husband and sons. The husband remarried, retired, and ultimately died, at which time the sons sought to enforce their asserted state-law interest in

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[2] There is thus no reason for the Court to hold the petition in this case for disposition in light of *Egelhoff* v. *Egelhoff*, No. 99-1529, which presents the question whether ERISA preempts a state law that purports to revoke upon divorce a plan participant's designation of his spouse as beneficiary pursuant to the terms of an ERISA plan. In that case, the petitioner and the United States, as amicus curiae, have argued, among other things, that the state law, as applied to ERISA pension plans, conflicts with ERISA's anti-alienation provision. See Pet. Br. 36-41; U.S. Br. 24-25. Moreover, the Final Order in this case, as the product of a federal regulatory agency issued with the express consent of a plan participant, bears no resemblance to the state law at issue in *Egelhoff*.

the benefits against the second wife. See *Boggs*, 520 U.S. at 836-837.

The Court held that the state law on which the sons based their claim to benefits was preempted as "conflict[ing] with the provisions of ERISA" and "operat[ing] to frustrate its objects." *Boggs*, 520 U.S. at 841. In addressing the sons' claim to various benefits that had been distributed to their father during his retirement, the Court explained that the sons had no right to those benefits under ERISA itself, because the sons were "neither participants nor beneficiaries" under the plan as those terms are defined in ERISA. *Id.* at 848. The Court declined the sons' invitation to "ignore" ERISA's definition of participant and beneficiary and to permit the use of state law to "create a new class of persons for whom plan assets are to be held and administered." *Id.* at 850. The Court added that its "conclusion that Congress intended to pre-empt [the sons'] nonbeneficiary, nonparticipant interests in the retirement plans is given specific and powerful reinforcement by the pension plan anti-alienation provision"; the Court explained that the first wife's testamentary transfer was "a prohibited 'assignment or alienation'" because, as of the time that the transfer occurred, the sons "would have acquired * * * an interest in [the father's] pension plan at the expense of plan participants and beneficiaries." *Id.* at 851-852.

The OTS Final Order, unlike the state community-property law in *Boggs*, presents no issue of federal pre-emption. Instead, if petitioner's challenge to the Final Order were properly presented in this case, the issue would be whether ERISA's anti-alienation provision operates to constrain the authority of OTS, a federal regulatory agency, with respect to "the examination, safe and sound operation, and regulation of savings

associations," such as FirstBanc, and affiliated persons, such as petitioner, 12 U.S.C. 1463(a)(1). That issue requires a different analysis than does an issue of federal preemption of state law. Compare 29 U.S.C. 1144(a) (providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan") with 29 U.S.C. 1144(d) (providing that "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under any such law"). Accordingly, although the court of appeals should not have reached the merits of petitioner's challenge to the Final Order, the court of appeals' resolution of that challenge does not conflict with *Boggs*.

c. Petitioner does not contend that the decision below conflicts with any decision of any other court of appeals. Instead, petitioner asserts (Pet. 10-11) that "[t]his case presents the Court with an opportunity to correct those courts who fail or refuse to acknowledge that the anti-alienation clause of ERISA applies across the board to voluntary and involuntary assignments of future retirement benefits alike."[3] But this case is

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[3] Petitioner does not specifically identify any such cases. Presumably, he is referring to the cases cited by the court of appeals—*Finz* v. *Schlesinger*, 957 F.2d 78 (2d Cir.), cert. denied, 506 U.S. 822 (1992), and *Lumpkin* v. *Envirodyne Industries, Inc.*, 933 F.2d 449 (7th Cir.), cert. denied, 502 U.S. 939 (1991)—which, consistent with the decision below, upheld a knowing and voluntary waiver of pension plan benefits made as part of the settlement of a private dispute. Those cases stand for the unexceptional proposition that litigants claiming contested pension benefits may settle their dispute and are not required by the anti-alienation provision to litigate to the bitter end. See *Lumpkin*, 933 F.2d at 455.

distinguishable from the cases of other courts that petitioner believes to be in need of correction. None of those cases involved a consent order entered by a federal regulatory agency in settlement of potential cease-and-desist proceedings.[4]

2. Petitioner also challenges (Pet. 18-19) the court of appeals' ruling that 12 U.S.C. 1818(i)(1) barred the district court from adjudicating the validity of the Final Order in an action by OTS to enforce that Order. Petitioner contends (Pet. 18) that the court of appeals and the district court adopted an "overly broad reading" of Section 1818(i)(1), but petitioner identifies no decision of this Court or any other court that adopted a different reading. Indeed, this Court recognized in *MCorp Financial*, 502 U.S. at 44, that Section 1818(i)(1) "provides * * * clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review" or otherwise affect banking agency orders. In any event, the court of appeals, notwithstanding its ruling on Section 1818(i)(1), considered and rejected petitioner's challenge to the Final Order on the merits.[5]

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[4] We are advised by OTS that no cases involving similar cease-and-desist orders are likely to arise in the future.

[5] Petitioner's other challenges to the enforcement of the Final Order are without merit and wholly fact-bound. For example, petitioner asserts (Pet. 21-24) that the Final Order should not have been enforced because his beneficiaries were not parties to the proceedings in the district court. Petitioner failed to raise such an argument in the district court; indeed, petitioner signed a pre-trial stipulation that no additional parties were needed for adjudication of the matter. OTS C.A. Br. 6. The court of appeals, after noting that petitioner's wife had not sought to intervene in the action to

3. Petitioner further contends (Pet. 11, 16-18) that the court of appeals erred in rejecting his challenge to the order issued by TSLD. The court of appeals' holding with respect to the TSLD order rested solely on state-law grounds—*i.e.*, that the TSLD order was entitled to res judicata effect as a matter of Texas law. See Pet. App. 19-21. And petitioner concedes (Pet. 16) that "Texas law governs the preclusive effect of a judgment rendered by * * * a Texas administrative agency" such as TSLD. This Court does not grant certiorari to review the lower federal courts' applications of state law. See, *e.g.*, *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); *Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963).

Moreover, because the court of appeals held that petitioner was barred by res judicata from challenging the TSLD order, the court of appeals found it unnecessary to address the merits of petitioner's challenge, *i.e.*, that the state statutes under which TSLD issued its order were preempted by ERISA. Pet. App. 21. The court of appeals also noted that those statutes had since been repealed by the Texas Legislature. *Ibid.* There is no more reason for this Court to address petitioner's preemption claim than there was for the court of appeals to do so.

4. Finally, petitioner argues (Pet. 24-29) that the district court abused its discretion in awarding attorneys' fees to the ESOP trustee. The court of appeals, after noting that petitioner "admit[ted] that he failed to timely challenge" the attorneys' fee award, reviewed the award under the plain-error standard.

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assert her interests as beneficiary, correctly declined to consider any claims regarding those interests. Pet. App. 21.

Pet. App. 22. Petitioner does not attempt to demonstrate that the award constituted reversible error under that standard. In any event, petitioner's challenge to the award turns on the particular facts of this case, and thus presents no issue of general significance warranting the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2000